

No. 11843

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellee.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeals From the District Court of the United States
for the Southern District of California

Central Division

FILED

APR 31 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Los Angeles 14, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 4256-PH.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION

Pacific Electric Railway Company brings this its petition against the United States of America pursuant to the provisions of Section 41, Paragraph 20, of Title 28 of the United States Code, and for a cause of action alleged as follows:

I.

Plaintiff is a corporation duly incorporated and consolidated under the Laws of the State of California, operating a system of railway in the Counties of Los Angeles, Orange, San Bernardino and Riverside, California, and is now and was during all of the times hereinafter mentioned engaged in the operation thereof as a common carrier of property in both intrastate and interstate commerce. Plaintiff maintains its principal office in the City of Los Angeles, County of Los Angeles, State of California, in the above referred to District. [2]

II.

At certain times in 1943, as hereinafter more particularly stated, plaintiff in participation with other common carriers by railroad, at the request of the defendant by and through its Maritime Commission or through other authorized departments or agents, transported for and on behalf of defendant, from various points in the United States, shipments to Los Angeles, California. All of the said shipments were made upon through Government bills of lading according to a certain form prescribed and furnished by defendant. Plaintiff, as final and delivering carrier, made delivery of the shipments in accordance with the bills of lading.

Annexed to this petition and made a part hereof is a statement marked Exhibit "A" showing the details of the service performed as aforesaid, including the kind of property transported, the points between which transportation was performed, the routes of movement, the number of plaintiff's bills and dates thereof, the number of Government bills of lading and dates thereof, identity of cars in which transportation was performed, dates of delivery, weights of carload shipments transported, applicable tariff rate, amounts billed, amounts paid, balance claimed, consignor and consignee, and reference to the lawfully published and effective tariffs containing the freight rate or rates applicable to the transportation of the shipments involved and conditions in connection therewith, said tariffs being shown by their abbreviations, which are well known among carriers and shippers.

III.

Each of the carriers participating in said transportation was, at all times herein mentioned, a party to and

participated in the tariff or tariffs specifying the applicable rate or rates for said transportation services. Said tariffs and the rates specified therein were duly published and filed with the Interstate Commerce [3] Commission as required by the provisions of Section 6 of Part I of the Interstate Commerce Act and was in legal effect at the time when the shipments were made. Plaintiff based the amounts of the charges billed defendant for said transportation services on the duly published and filed and legally effective applicable rate or rates specified in said applicable tariff or tariffs and shown as aforesaid in Exhibit "A", attached hereto.

IV.

Thereafter, and upon the completion and delivery of each such shipment plaintiff, being the final and delivering carrier, from time to time submitted its bills to defendant for the total amount of Nineteen Thousand Nine Hundred Twenty-Six and 65/100 Dollars, (\$19,926.65) for the service of transportation so rendered as heretofore described, based upon the lawful and applicable rate or rates as aforesaid, and demanded payment of said amount for said transportation services performed by plaintiff and other participating carriers. Defendant refused to make payment in the sum of Nineteen Thousand Nine Hundred Twenty-Six and 65/100 Dollars (\$19,926.65) for such transportation services, and paid to plaintiff the sum of Ten Thousand Two Hundred Seventy-Two and 17/100 Dollars (\$10,272.17). The sum so paid was accepted by plaintiff under protest and as part pay-

ment only. Plaintiff subsequently rendered its bills to defendant for the unpaid balance of said transportation charges in the total amount of Eight Thousand Nine Hundred Forty-Seven and $73/100$ Dollars (\$8,947.73), credit having been given defendant for the sum of Seven Hundred Six and $75/100$ Dollars (\$706.75) overpaid on a prior bill, but defendant refused and still refuses to pay said amount or any part thereof.

V.

All carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, participating [4] in the transportation of the shipments herein described, and each of them, and all carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, parties to and participating in any land grant route or routes with which the route or routes of movement of the said shipments herein described were equalized under agreement with the United States from the standpoint of net charges to the United States for transportation service, and each of them, had, prior to and at the time of said shipments, filed with the Secretary of the Interior of the United States, in the form and manner prescribed by him, releases of all of their, and its, claims against the United States to lands, interests in lands, compensation, or reimbursement on account of

lands and interest in lands which have been granted, claimed to have been granted, or which it was claimed should have been granted to any such carrier or predecessor in interest under any grant to such carrier or predecessor in interest, in full and complete compliance with the provisions and requirements of paragraph (b) of Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. L. 954). Each of such releases so filed was approved by the Secretary of the Interior prior to the shipments in question and the performance of the transportation service hereinbefore set forth.

VI.

By reason of the matters and things herein stated, plaintiff is justly entitled to the sum of Eight Thousand Nine Hundred Forty-Seven and 73/100 Dollars (\$8,947.73) from the United States of America on account of the shipments hereinbefore described, after allowing all charges, credits and offsets. No part thereof has been paid and no assignment or transfer of said [5] claim or any part thereof or interest therein has been made.

Wherefore, plaintiff prays judgment in its favor against the United States of America in the sum of Eight Thousand Nine Hundred Forty-Seven and 73/100 (\$8,947.73).

FRANK KARR

C. W. CORNELL

E. D. YEOMANS

Attorneys for Plaintiff

EXHIBIT "A"

Commodity: Machinery

Consignor: Foster Wheeler Corporation

Consignee: California Shipbuilding Corporation—
United States Maritime Commission

From Carteret, New Jersey to Los Angeles Harbor, California via The Central Railroad Company of New Jersey, Reading Company, Western Maryland Railway Company, The Baltimore and Ohio Railroad Company, Chicago, Rock Island and Pacific Railway Company, Southern Pacific Railroad Company and Pacific Electric Railway Company.

	<u>Number</u>	<u>Date</u>
Government B/L	MC-218872	1-26-43

Carriers Bills:

Original Bill	F-18436-3	3-43
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Supplemental Bill	R-18436-3	3-44
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Car Initial & No.	Delivered On Or About		Wgt.	Tariff Rate	Amount Billed	Amount Paid	Balance Claimed
L&N 57464	2-19-43		48380	2.26	\$1,093.39	\$717.99	\$375.40

Tariff Authority: T. C. F. B. 1-W, Item 3960.

General Accounting Office Certificate No. T-211357

Claim No. 727133, 11-1-43

Date payment received: November 20, 1943 [7]

Commodity: Line Shaftings

Consignor: Shartle Bros. Machine Company

Consignee: California Shipbuilding Corporation—
United States Maritime Commission

From Middletown, Ohio to Los Angeles, California via
The New York Central Railroad Company, Minneapolis
& St. Louis Railroad Corporation, Chicago, Rock
Island and Pacific Railway Company, Southern Pacific
Railroad Company and Pacific Electric Railway Com-
pany.

	Car		
	<u>Initial & No.</u>	<u>Number</u>	<u>Date</u>
Government B/L	PLE 42097	MC-311664	10-19-43
	NYC 711333	MC-311665	10-23-43

Carriers Bills:

Original Bill	F-26475-1	1-44
Supplemental Bill	R-26475-1	9-44

Car	Delivered On	Tariff	Amount	Balance	
Initial & No.	Or About	Wgt.	Billed	Claimed	
PLE	42097	11-5-43	87000	1.96	\$1,705.20
NYC	711333	11-9-43	79980	1.96	1,567.61
					<u>\$3,272.81</u>
					\$212.70
NOTE: Credit of \$706.75 given defendant for overpayment on prior bill					<u>706.75</u>
					\$2,353.36

Tariff Authority: T. C. F. B. 1-X, Item 3960

Date of payment: July 17, 1944

Credit of \$706.75 shown above, was on Government B/L
MC-27046, MC-27036 and MC-34905, Carriers Bill
F-10540-1, 1-42, G. A. O. File T-2137345 5-42 G.
F. A. [8]

Commodity: Steel Plates

Consignor: Republic Steel Corporation

Consignee: California Shipbuilding Corporation—
United States Maritime Commission.

From Alabama City, Alabama to Los Angeles Harbor, California, via The Alabama Great Southern Railroad Company, New Orleans & North Eastern Railroad Company, Mississippi Central Railroad Company, Louisiana & Arkansas Railway Company, Southern Pacific Railroad Company and Pacific Electric Railway Company.

Car

	<u>Initial & No.</u>	<u>Number</u>	<u>Date</u>
Government B/L	IC 95932	MC-411214	5-16-43
	PRR 750831	MC-411214	5-16-43
	PRR 346916	MC-411234	5-22-43
	Sou 176796	MC-411234	5-22-43
	PRR 344421	MC-411234	5-22-43
	NYC 706861	MC-411234	5-22-43
	Sou 287197	MC-411234	5-22-43
	SAL 96976	MC-411239	5-23-43
	Sou 55466	MC-411239	5-23-43
	NYC 633406	MC-411273	5-31-43

Carriers Bills:

Original Bill	F-21750-7	7-43
Supplemental Bill	F-21750-7A	11-43
Supplemental Bill	R-21750-7	8-44

Car Initial & No.	Delivered On		Rate	Amount		Balance Claimed
	Or About	Wgt.		Billed	Paid	
IC 95932	6-3-43	109845	1.19	\$1,208.30	\$ 742.55	\$ 465.75
PRR 750831	6-3-43	160095	1.19	1,761.05	1,082.24	678.81
PRR 346916	6-9-43	145500	1.19	1,600.50	983.58	616.92
Sou 176796	6-9-43	99590	1.19	1,095.49	673.23	422.26

Continued on next page

[9]

Car Initial & No.	Delivered On		Rate	Amount		Balance Claimed
	Or About	Wgt.		Billed	Paid	
Continued						
PRR 344421	6- 9-43	147015	1.19	\$1,617.17	\$ 933.82	\$ 623.35
NYC 706861	6- 9-43	142750	1.19	1,570.25	964.99	605.26
Sou 287197	6- 9-43	111655	1.19	1,228.20	754.79	473.41
SAL 96976	6-12-43	105615	1.19	1,161.77	713.96	447.81
Sou 55466	6-12-43	127500	1.19	1,402.50	858.49	544.01
NYC 633406	6-22-43	103525	1.19	1,138.78	699.83	438.95
Total						\$5,316.53

Tariff Authority: T. C. F. B. 1-W, Item 3730

General Accounting Office, Certificate No. T-215332

Claim No. 731171 2-26-44

Date of payment: February 26, 1944 [10]

Commodity: Steel and Hardware

Consignor: Union Metal Manufacturing Company

Consignee: Pacific Union Marbelite Company—United States Maritime Commission

From Canton, Ohio to Los Angeles, California, via Wheeling & Lake Erie Railway Company, Erie Railroad Company, Chicago and North Western Railway Company, Union Pacific Railroad Company and Pacific Electric Railway Company.

	<u>Number</u>	<u>Date</u>
Government B/L	MC-748457	12-23-43

Carriers Bill:

Original Bill	F-27095-2	2-44
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Supplemental Bill	R-27095-2	10-44
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Car Initial & No.	Delivered On		Wgt.	Tariff Rate	Amount		Balance Claimed
	Or	About			Billed	Paid	
WLE 72727	1-7-44		68680	1.27	\$ 872.24		
WLE 72727	1-7-44		6120	3.50	214.20		
					\$1,086.44		

Tariff Authority: T. C. F. B. 1-X, Items 3730, 3085, 3450.

Commodity: Steel Boiler K D

Consignor: Babcock Wilson Company

Consignee: Consolidated Steel Corporation—United States Maritime Commission

From Barberton, Ohio to Los Angeles Harbor, California, via Erie Railroad Company, Chicago, Rock Island and Pacific Railway Company, Southern Pacific Railroad Company and Pacific Electric Railway Company.

	<u>Number</u>	<u>Date</u>
Government B/L	MC-694508	12-7-43 [11]

Carriers Bills:

Original Bill	F-27095-2	2-44
Supplemental Bill	R-27095-2	10-44

Car Initial & No.	Delivered On Or About	Wgt.	Tariff Rate	Amount Billed	Paid	Balance Claimed
PMcKY 91018	12-28-43	M60000	1.15	\$ 690.00		
Tariff Authority	T.C.F.B. 1-X, Item 6110					
Brought forward—Bill No. F-27095-2				1,086.44		

				\$1,776.44	\$874.00	\$902.44

Date of payment: August 4, 1944

[Endorsed]: Filed Feb. 16, 1945. Edmund L. Smith, Clerk. [12]

[Title of District Court and Cause]

ANSWER

Defendant, United States of America, for its answer to plaintiff's complaint herein denies and alleges as follows, to-wit:

I.

Denies so much of Paragraph II of plaintiff's complaint as alleges that Exhibit "A" attached to the complaint sets forth, or shows, the applicable tariff rate; and further denies so much of Paragraph II as alleges that Exhibit "A" contains reference to the lawfully published and effective tariffs containing the freight rate, or rates, applicable to the transportation of the shipments involved and conditions in connection therewith.

II.

Denies so much of Paragraph III of plaintiff's complaint as [13] alleges that plaintiff based the amounts of the charges billed defendant for said transportation services on the duly published and filed and legally effective applicable rate or rates specified in said applicable tariff or tariffs and shown as aforesaid in Exhibit "A".

III.

Denies so much of plaintiff's complaint marked Paragraph IV as alleges that the bill for \$19,926.65 was based upon the lawful and applicable rate or rates as aforesaid.

IV.

Denies each and every allegation contained in plaintiff's complaint marked Paragraph VI.

Wherefore, plaintiff prays judgment dismissing the complaint herein and for its costs and disbursements.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

WM. W. WORTHINGTON

Assistant U. S. Attorney

By Wm. W. Worthington

Attorneys for Defendant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 8, 1946. Edmund L. Smith,
Clerk. [14]

[Title of District Court and Cause]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto by their attorneys that the following evidentiary facts are true, provided that both parties shall have the right to offer other and further evidence not inconsistent therewith, and may bring to the attention of the Court any facts of which the Court may take judicial notice.

I.

Plaintiff is a common carrier by rail. In transporting all of the materials referred to in this stipulation, it acted as the last in a series of connecting carriers. All of the shipments comprised materials for use in the construction of vessels (Liberty Ships) built by California Shipbuild-

ing Corporation for the United States Maritime Commission under the latter's ship [15] construction program on a cost-plus-fixed fee basis, as follows:

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
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MCc-7785 (ESP-10) dated 3/14/41, pursuant to Act approved 2/6/41 (Public Law 5, 77th Congress), 55 Stat. 5. This contract provided, among its recitals, as follows:

“Pursuant to the provisions of an Act approved February 6, 1941 (Public No. 5, 77th Congress), the Commission is authorized to construct in the United States ocean-going cargo vessels of such type, size and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States, and to be capable of the most rapid construction;

“The Commission has determined to have certain vessels hereinafter described constructed for the aforementioned purpose pursuant to the provisions of the foresaid Act;”

31 64 94

Some of the costs of this contract were allocated to funds made available by Public Law 247, 55 Stat. 669, 681.

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
<p>MCc-7786 (DA-16) dated 5/1/41, pursuant to Joint Resolution approved 3/27/41 (Public Law 23, 77th Congress), 55 Stat. 53. This contract provided, among its recitals, as follows:</p> <p>“Under the provisions of Public Law No. 23 (77th Cong.), approved March 27, 1941, certain appropriations were made for the procurement by [16] manufacture or otherwise of defense articles for the government of any country whose defense the President deems vital to the defense of the United States;</p> <p>“The President, acting pursuant to said law, has authorized the Commission to enter into commitments for the construction of emergency type vessels similar to those which the Commission is authorized to construct under the Joint Resolution approved 2/6/41 (Public No. 5, 77th Congress);”</p>	24	277- 300
<p>Some of the costs of this contract were allocated to funds made available by Public Law 247, 55 Stat. 669, 681.</p>		
<p>MCc-2128* dated 1/17/42, pursuant to Public Law 247 (77th Congress) approved 8/25/41, 55 Stat. 669 at 681.</p>		

*Contracts MCc-2128, MCc-7834 and MCc-13097 provide that the shipbuilding corporation may carry on the work 7 days a week and any number of shifts.

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
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This contract provided, among its recitals, as follows:

“Under the provisions of Public Law 247 (77th Congress) approved August 25, 1941, the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries [17] and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;

“The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries, and desires the Contractor to construct said vessels;”

109 631- 739

MCc-7834 dated 6/16/42, pursuant to Public Law 247 (77th Congress) approved 8/25/41, 55 Stat. 669 at 681. This contract provided, among its recitals, as follows:

“Under the provisions of Public Law 247 (77th Congress) approved August

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
<p>25, 1941, the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;</p> <p>“The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or [18] military auxiliaries, and desires the Contractor to construct said vessels;”</p>	60	1632-1691
<p>MCc-13097 dated 12/24/42, pursuant to Public Law 247 and Public Law 630 (77th Congress), 55 Stat. 669 at 681 and 56 Stat. 392 at 418, respectively. This contract provided among its recitals, as follows:</p> <p>“Under the provisions of Public Law 247 and 630 (77th Congress) the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine</p>		

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
-------------------------------	-------------------	------------------------

to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;

“The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries, and desires the Contractor to construct such vessels;”

	62	1854-1915
MCc-13097 Addendum #2	50	(2225-2244 (2538-2567
	—	
Total	336	[19]

II.

At the time the shipments were made and delivered, California Shipbuilding Corporation and other companies were engaged in building for the United States Maritime Commission cargo ships of the “Liberty” design, E C2-S - C1.

III.

The shipbuilding program of the Maritime Commission was initiated in 1938, pursuant to the Merchant Marine

Act, 1936, 49 Stat. 1985. The program as originally planned in 1938 was the building of 50 new cargo ships a year for a period of ten years. Early in 1941, the shipbuilding program was enlarged under the authority of the Act of February 6, 1941, 55 Stat. 5, and work was begun on 200 cargo ships of the Liberty design. Later in 1941, the program was again enlarged under the authority of the Act of March 27, 1941, 55 Stat. 54 (Defense Aid Supplemental Appropriation Act), and the Act of August 25, 1941, 55 Stat. 681 (First Supplemental National Defense Appropriation Act, 1942) and the number of Liberty ships to be delivered by the end of 1943 was increased to more than 1200 ships. Under the authority of the Act of June 27, 1942, 56 Stat. 392 at page 418 (Independent Offices Appropriation Act, 1943) the program was further enlarged. The programming for new ship construction was made after consultation with the Joint Chiefs of Staff. Between 1939 and 1945, 2610 Liberty vessels, of 28,170,856 deadweight tons, were delivered by the various shipbuilding corporations. Of these, 336 vessels of 3,626,091 deadweight tons, were delivered by the California Shipbuilding Corporation.

Most of the Liberty ships were operated as merchant vessels under direction and control of War Shipping Administration through agency agreements with private operators, carrying Army and Navy cargoes, lend-lease material, raw materials, and civilian goods. Of the remainder, some were sent to lend-lease nations under charter and the others were transferred to the Army and Navy to serve as [20] combat loaders, troop ships, hospital ships, and other auxiliaries.

The ships of the Liberty design were constructed under the enlarged shipbuilding program authorized by the

Acts of February 6, 1941, March 27, 1941, August 25, 1941, and June 27, 1942. They were cargo ships designed for eleven knots, of 10,000 tons deadweight capacity and of a design approved by the Maritime Commission in 1940 for mass production. They were adapted from an old design for a common type of British coal-burning tramp steamer. The modifications in design were the use of electrical welding instead of riveting in the construction of the hull and the addition of a deep ballast tank for oil.

IV.

All of such shipments were consigned on Government bills of lading and were delivered to the Maritime Commission, c/o California Shipbuilding Corporation, Los Angeles, California, or to California Shipbuilding Corporation for account of the Maritime Commission. All the purchases were assigned a War Production Board Priority of A-1-a, A-1-b, or A-1-c and in the case of contract MCC-7300, a priority of AA-1, which were high priorities.

Some of the bills of lading referred to the "military or naval" character of the shipments. Some of the bills of lading made no such reference. When the reference appears on any bill, that fact is specifically noted in this stipulation.

The Government bills of lading referred to herein were prepared and furnished by or on behalf of the Maritime Commission. All the materials included in the shipments set forth in this stipulation were purchased with funds from the same appropriations as the appropriations from which the freight charges were paid.

The appropriation "69X0200 Construction Fund, U. S. Maritime Commission, Act of June 29, 1936, Revolving Fund" refers to the fund created by the Merchant Marine Act, 1936, Section 1116, U. S. C. A. The appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C." [21] has reference to the fund created by the Act of February 6, 1941, Public Law 5, 77th Congress. The appropriation "69-111/30023 Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943" has reference to one of the funds created by the Act of March 27, 1941, Public Law 23, 77th Congress, for carrying out the purposes of the Lend-Lease Act, Act of March 11, 1941, Public Law 11, 77th Congress. [22]

V.

All carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, participating in the transportation of the shipments herein described, and each of them, and all carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, parties to and participating in any land grant route or routes with which the route or routes of movement of the said shipments herein described were equalized under agreement with the United States from the standpoint of net charges to the United States for transportation service, and each of them, had, prior to and at the time of said shipments, filed with the Secretary of the Interior of the United States, in the form and manner prescribed by him, releases of all of their, and its, claims against the United States to lands, interests

in lands, compensation, or reimbursement on account of lands and interest in lands which have been granted, claimed to have been granted, or which it was claimed should have been granted to any such carrier or predecessor in interest under any grant to such carrier or predecessor in interest, in full and complete compliance with the provisions and requirements of paragraph (b) of Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. L. 954). Each of such releases so filed was approved by the Secretary of the Interior prior to the shipments in question and the performance of the transportation service herein set forth.

VI.

Pertaining to Carrier's Bill No. F-18436-3, Page 6 of Petition:

On March 12, 1943, plaintiff delivered condensers [23] (machinery) consigned January 26, 1943 by Foster Wheeler Corporation, Carteret, New Jersey, covered by bill of lading No. MC-218872 issued September 23, 1942, which was stamped "military or naval property of the United States moving for military or naval and not for civil use". The shipment comprised material furnished under purchase order No. CD-MC-42-110 (MCc-3173) dated December 12, 1941, and these materials were purchased for use in the construction of United States Maritime Commission hulls Nos. 1800-1909. This purchase order provided, "Terms of delivery f.o.b. Carteret, N. J." and specified shipment on government bill of lading.

Plaintiff billed its charges for this shipment in its original bill No. F-18436-3 for \$1,093.39, representing the full commercial rate.

Defendant, claiming that the charge was subject to land grant rates, disallowed \$375.40 and paid \$717.99. Payment for the shipment of this freight was charged to appropriation "69X0200 Construction Fund, U. S. Maritime Commission, Act of June 29, 1936, Revolving Fund".

Plaintiff protested the disallowance of \$375.40 and payment of only \$717.99 on its bill No. F-18436-3, and billed defendant by supplemental bill for the sum of \$375.40. If the shipment was entitled to the land-grant rate, this disallowance was correct and nothing further is due on this bill; if not, plaintiff is entitled to recover \$375.40.

VII.

Pertaining to Carrier's Bill No. F-26475-1, Page 7 of Petition:

Plaintiff submitted its bill No. F-26475-1 to the United States Maritime Commission for \$3,272.81 for transportation services. Defendant deducted from said bill claimed overpayments of the following amounts on the following prior bills and paid plaintiff the sum of \$212.70 cash: [24]

<u>Bill Number</u>	<u>Amount</u>
F-10611-1	\$ 600.51
F-10503-12	321.02
F-10610-1	811.08
F-10540-1	1,327.50
	<hr/>
	\$3,060.11

Plaintiff protested the deduction of \$3,060.11 from its bill No. F-26475-1 and received the \$212.70 paid under protest, and billed defendant on its supplemental bill for

\$3,060.11. In its petition, plaintiff gave defendant a credit of \$706.75 on its bill No. F-10540-1, leaving a balance in dispute of \$2,353.36.

The following are the facts in respect to each of the bills which defendant used as the basis for deductions from bill No. F-26475-1:

Facts as to Bill No. F-10611-1:

On January 20, 1942, plaintiff delivered power boilers and fixtures consigned on December 16 and 17, 1941 by Combustion Engineering Company, Inc., Chattanooga, Tennessee. The shipment was covered by bill of lading MC-21162 issued September 27, 1941. The shipment comprised material furnished under contract No. MCc-(ESP)-1008 dated April 14, 1941, which was for 200 hulls, later increased by 29 hulls, and these materials were moving for use in the construction of U. S. M. C. hulls Nos. 64-94. This contract provides for a price f.o.b. point of shipment, and shipment on Government bill of lading. Section 14 of the commitment letter of March 8, 1941, provided:

“Time is of the essence of this contract, and it is understood that the principal Vendor will diligently prosecute production, including overtime where advantageous, to effect delivery as rapidly as possible, and if possible, considerably in advance of the schedule set forth in the following paragraph:” [25]

Plaintiff billed its charges for this shipment in its original bill No. F-10611-1 for \$1,345.50, representing the full commercial rate. This bill was paid in full, the payment being charged \$758.86 to appropriation “69X0201 Emergency Ship Construction Fund, U. S. M. C.”,

\$586.64 to appropriation "69-111/30023 Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943".

On May 14, 1943, defendant demanded a refund of \$600.51 representing the difference between the full commercial rate and the land-grant rate on the shipment covered by bill of lading MC-21162. Plaintiff refused the refund and defendant deducted the \$600.51 from bill No. F-26475-1. If this shipment was entitled to land-grant rates, the correct charges would be \$744.99, and deduction of \$600.51 from bill No. F-26475-1 was proper; if not, the charge of \$1,345.50 was correct, and no portion thereof should have been disallowed, or deducted from bill No. F-26475-1 or from any other bill, and plaintiff is entitled to recover said sum of \$600.51.

Facts as to Bill No. F-10503-12:

On December 29, 1941, plaintiff delivered steel plates consigned on December 9, 1941 by Inland Steel Company-Indiana Harbor Works, Indiana Harbor, Indiana. The shipment in question was covered by bill of lading No. MC-88579 issued November 25, 1941.

Plaintiff billed its charges for these shipments in its original bill No. F-10503-12 for \$2,069.76, representing the full commercial rate. This bill was paid in full, payment being charged \$1,167.34 to appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C.", and \$902.42 to appropriation "69-111/30023 Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943".

On August 6, 1943, defendant demanded a refund of \$321.02 representing the difference between the full commercial rate and the land-grant rate on the shipment covered by bill of lading No. [26] MC-88579. Plaintiff refused the refund and defendant deducted the \$321.02 from bill No. F-26475-1.

The shipment covered by bill of lading No. MC-88579 comprised material furnished under contract No. MCc(ESP)-1520 dated August 12, 1941, and these materials were purchased for use in the construction of U. S. M. C. hulls Nos. 64-94, and 277-300. This contract provided, among other matters:

- (a) Inland Steel was requested to furnish engine room and boiler plates "in accordance with attached . . . Inland Steel Co. proposal of June 27, 1941 (6/28/41-#148) - - - -"
- (b) Prices were "Delivered Base Prices per 100# FOB Cars" Los Angeles, Calif.
- (c) "Title to all of the products covered by this order will remain in the Seller until delivery thereof has been made to the Buyer at the destination herein named." (i. e., Los Angeles).
- (d) "The Seller's responsibility for delivery shall terminate on the arrival of the material at the destinations shown in this order."
- (e) "Cash discount to be allowed on discount base as stated on invoice, being the delivered price of the material less the transportation charges taken into account in arriving at such price."

- (f) "Such changes as may occur in the tariff freight rates or transportation charges used in determining the delivered prices provided for in this contract, except switching charges, after date of order, and on or prior to date of shipments will be for account of Buyer."
- (g) Shipments were to be on Government bill of lading.
- (h) "The equipment ordered herein is required for the [27] construction of emergency cargo vessels."
- (i) "There are no written understandings or agreements between the Buyer and Seller relative to this order that are not fully referenced or expressed herein."

The Inland Steel Company proposal of June 27, 1941 referred to in paragraph (a) above, stated, among other matters:

"This price is for material shipped to and including September 30, 1941, after which time the price will be the published price at Chicago, Illinois, in effect at the time of shipment, plus the all-rail freight rate to the three destinations."

"If the Government wishes to take possession of this material at our plant and ship on Government Bills of Lading in order to take advantage of land grant freight rates, we will deduct the regular commercial freight rate, which at present is \$1.10 per 100 lbs."

If this shipment was entitled to land-grant rates, the correct charges would be \$1,748.74, and deduction of \$321.02 from bill No. F-26475-1 was proper; if not, the charge of \$2,069.76 was correct, and no portion thereof should have been disallowed or deducted from bill No. F-26475-1 or from any other bill, and plaintiff is entitled to recover said sum of \$321.02.

Facts as to Bill No. F-10610-1:

On January 23, 1942, plaintiff delivered a shipment covered by two bills of lading. Bill of Lading No. MC-22992, issued October 3, 1941, covered steel angles and steel channels consigned on December 29, 1941 by Carnegie-Illinois Steel Corporation, manufactured under contract No. MCc-(ESP)-1145 dated June 20, 1941. Bill of Lading No. MC-19113, issued September 19, 1941, covered steel plates consigned on January 6, 1942 by Jones [28] & Laughlin Steel Corporation, manufactured by it under contracts Nos. MCc-ESP-1016 and MCc-ESP-1083 dated April 16, 1941 and May 17, 1941, respectively.

Contract No. MCc(ESP)-1145 set forth a schedule of "Delivered base prices per 100# F.O.B. Cars Los Angeles, Cal.", and specified that "Title to all of the products covered by this order will remain in the Seller until delivery thereof has been made to the Buyer at the destination herein named", and that "Shipment to be made on Government Bill of Lading". The destination named was Los Angeles, California. These steel angles and steel channels purchased under contract No. MCc(ESP)-1145 were purchased for use in the construction of U. S. M. C. hulls Nos. 277-300.

Contract No. MCc(ESP)-1083 set forth a schedule of prices as follows:

"Price:

Base prices per 100 lb. delivered f.o.b. cars at the shipyard, Los Angeles, California, as follows, depending on the method of shipment:

All rail shipment	\$3.37
All rail shipment on Government Bill of Lading allowing commercial rate of freight at \$1.27 per 100 lb.	3.37
Via rail and water	2.98"

It prescribed shipment on government bill of lading. These steel plates purchased under contract MCc(ESP)-1083 were purchased for use in the construction of U. S. M. C. hulls Nos. 277-300.

Contract No. MCc(ESP)-1016 set forth a schedule of prices identical with the schedule under contract MCc(ESP)-1083. The contract stated that it was "in accordance with U. S. M. C. (By G & C) letter No. 1133/S11 (BB2-153), dated April 1, 1941, hereto [29] attached". The letter stated, in part:

"In respect of prices, the United States Maritime Commission has directed that your base price, amounting to \$2.10 per 100 pounds, f.o.b. your mill be accepted, shipment to be on Government bill of lading, or as the United States Maritime Commission may direct ---"

These steel plates purchased under contract MCc(ESP)-1016 were purchased for use in the construction of U. S. M. C. hulls Nos. 64-94.

Plaintiff billed its charges for these shipments in its original bill No. F-10610-1 for \$2,068.88, representing the full commercial rates, as follows:

<u>Bill of Lading No.</u>	<u>Amount Billed</u>	<u>Amount in Dispute</u>
MC-22992	\$ 515.42	\$201.89
MC-19113	1,553.46	609.19
	\$2,068.88	\$811.08

This bill was paid in full, \$1,166.85 being charged to appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C.", and \$902.03 to appropriation "69-111/30023—Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943". On August 18, 1943, defendant demanded a refund of \$811.08 representing the difference between the full commercial rate and the land-grant rate on the shipments covered by bills of lading Nos. MC-22992 and MC-19113. Plaintiff refused the refund and defendant deducted the \$811.08 from bill No. F-26475-1. If this shipment was entitled to land-grant rates, the correct charges would have been \$1,257.80 and the deduction of \$811.08 from bill No. F-26475-1 was proper; if not, the charge of \$2,068.88 was correct as billed, and no portion thereof should have been disallowed, or deducted from bill No. F-26475-1 or from any other bill; and plaintiff is entitled to recover said sum of \$811.08.

Facts as to Bill No. F-10540-1:

This bill covered charges for shipments under six bills [30] of lading Nos. MC-28270, MC-27046, MC-08411, MC-27036, MC-34759 and MC-34905, only two of which are in dispute, as follows:

On January 6, 1942, plaintiff delivered the shipment under bill of lading No. MC-28270, issued October 13, 1941, covering steel plates consigned on December 21, 1941 by Otis Steel Company, manufactured by it under purchase order No. MCc(ESP)-1837 dated September 8, 1941. These steel plates purchased under purchase order No. MCc(ESP)-1837 were purchased for use in the construction of U. S. M. C. hulls Nos. 64-94 and hulls Nos. 277-300.

On January 8, 1942, plaintiff delivered the shipment under bill of lading No. MC-34759, issued December 11, 1941, covering steel sheets consigned on December 22, 1941 by Youngstown Sheet & Tube Company, manufactured by it under purchase order No. MCc(ESP)-2690 dated November 27, 1941. These steel sheets purchased under purchase order No. MCc(ESP)-2690 were purchased for use in the construction of U. S. M. C. hulls Nos. 64-94 and hulls Nos. 277-300.

The purchase orders and contract under which the material was bought by the Commission specified shipment on Government bill of lading.

Purchase order No. MCc(ESP)-1837 provided under Price:

“Price—Delivered Base Price

per 100 lbs. f.o.b. Cleveland, Ohio, plus freight all rail in carload lots of 40,000# minimum East Coast and Gulf points, 40,000# minimum West Coast points.

Terminal Island, Los Angeles, California Unit Price \$3.37 Any increase or decrease in freight rate will result in a corresponding increase or decrease in delivered price.”

It also provided that: "Price quoted herein is based [31] on freight rates in effect at date of this quotation. If any increase or decrease in freight rates shall become effective prior to acceptance of this quotation by the Buyer, the price shown herein shall be revised accordingly."

The price in Purchase Order No. MCc(ESP)-2690 was "\$2.60 per 100# net f.o.b. your mill, Youngstown, Ohio . . ." Purchase orders Nos. MCc(ESP)-1837 and MCc(ESP)-2690 provided that the Seller's responsibility should terminate on arrival of the shipment at the "fabricating point", and that, "The goods covered herein are the property of the Seller until delivered to the Buyer at the Buyer's fabricating point [Los Angeles] herein specified and shall not be diverted or reconsigned without permission of the Seller."

Plaintiff billed its charges under the two bills of lading in dispute, in its original bill No. F-10540-1, for \$1,558.04, representing the full commercial rate, as follows:

<u>Bill of Lading No.</u>	<u>Amount Billed</u>	<u>Amount in Dispute</u>
MC-28270	\$1,050.04	\$420.02
MC-34759	508.00	200.73
	<hr/>	<hr/>
	\$1,558.04	\$620.75

The bill was paid in full, payment being charged in part to appropriation "69X0201—Emergency Ship Construction Fund, U. S. M. C.", and in part to appropriation "69-111/30023—Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943".

On August 23, 1943, defendant demanded a refund of \$620.75 representing the difference between the full com-

mercial rate and the land-grant rate on the shipments covered by bills of lading Nos. MC-28270 and MC-34759. Plaintiff refused the refund and defendant deducted the \$620.75 from bill No. F-26475-1. If this shipment was entitled to land-grant rates, the correct charge would have been \$937.29 and the deduction of \$620.75 from bill No. F-26475-1 was proper; if not, the charge of \$1,558.04 [32] was correct as billed, and no portion thereof should have been disallowed, or deducted from bill No. F-26475-1 or from any other bill, and plaintiff is entitled to recover said sum of \$620.75.

VIII.

Pertaining to Carrier's Bill No. F-21750-7, Pages 8 and 9
of Petition:

Between June 14, and June 23, 1943, plaintiff delivered steel plates consigned between May 16 and May 31, 1943, by Republic Steel Corporation, Alabama City, Alabama, covered by bills of lading Nos. MC-411214, MC-411234, MC-411239 and MC-411273 issued April 6, 1943, all of which were stamped "military or naval property of the United States moving for military or naval and not for civil use". The shipments comprised material furnished under contract No. MCc-7300, purchase order No. PD-MC-43-10664, dated March 4, 1943, and these materials were purchased for use in the construction of U. S. M. C. hulls Nos. 1880-1909. This purchase contract provided for delivery F.O.B. mill (Alabama City), for shipment on government bill of lading, and "In accepting this order

it is understood that you agree to all the terms and conditions expressly written or referred to herein including General Provisions, Form 4584 which are made a part hereof." Form 4584, among General Provisions, provides:

"Title to all materials, equipment, and supplies and other property assembled at Vendor's plant or elsewhere, or ordered for use in connection with the performance of the work under the contract, to the extent that Buyer makes payment therefor, even though delivery thereof has not been made, shall vest in Buyer."

No information is available as to when these materials were paid for in relation to the time of shipment.

Plaintiff billed its charges for this shipment in its original bill No. F-21750-7 for \$13,778.46, representing the full [33] commercial rate. Of this amount defendant disallowed \$5,312.62, which is the difference between land-grant rates and full commercial rates, paid plaintiff \$7,547.26 cash, and deducted \$918.58 for claimed overpayments of prior bills. Plaintiff protested the disallowance of \$5,312.62, but did not protest the deduction of \$918.58, and by supplemental bill, billed defendant for \$5,312.62. The payments of this bill were charged to appropriation "69X0200 Construction Fund, U. S. Maritime Commission, Act of June 29, 1936, Revolving Fund" If this shipment was entitled to land-grant rates, the correct charges would be \$8,465.84; if not, the correct charges would be \$13,778.46 and plaintiff is entitled to recover \$5,312.62.

IX.

Pertaining to Carrier's Bill No. F-27095-2, Pages 10 and
11 of Petition:

Plaintiff submitted its bill No. F-27095-2 to the United States Maritime Commission for \$1,776.44 for transportation services. Of this amount defendant paid plaintiff \$874.00 cash, and deducted \$902.44 for claimed overpayments for the following amounts on the following prior bills:

<u>Bill Number</u>	<u>Amount</u>
F-10535-1	\$496.69
F-11274-4	405.75
	<hr/>
Balance in Dispute	\$902.44

Plaintiff protested the deduction of \$902.44 from its bill No. F-27095-2, and received the \$874.00 paid under protest, and billed defendant by its supplemental bill for \$902.44.

The following are the facts in respect to each of the bills which were the basis of the deduction of \$902.44:

Facts as to Bill No. F-10535-1:

Between January 3, 1942 and January 9, 1942, plaintiff delivered engine parts consigned between December 17, 1941 and January 1, 1942, by Joshua Hendy Iron Works, Sunnyvale, California. [34] These shipments were covered by bills of lading Nos. MC-16624, MC-16623, MC-16626, MC-16627 and MC-16629, issued September 3, 1941.

These engine parts were purchased under contract No. MCc(ESP)-1028 dated April 16, 1941, which provided, in part, as follows:

“F.O.B. Point: Cars, Sunnyvale, Calif.

“Shipping Instructions: Shipment to be made on Government Bill of Lading to be furnished later.

“Title to all materials, equipment and supplies and other property assembled at the Vendor’s plant or elsewhere or ordered for use in connection with the performance of the work under this commitment to the extent that the Buyer makes payment therefor, even though delivery thereof has not been made, shall vest in the Buyer. This provision as to title shall not operate to relieve the Vendor of any of its obligations under this commitment.”

The contract provides for payment of 90% of total price by time of delivery to a transportation agency. These engine parts were purchased for use in construction of U. S. M. C. hulls Nos. 64-94.

Plaintiff billed its charges for these shipments in its original bill No. F-10535-1 for \$1,905.19, representing the full commercial rate. The bill was paid in full, payment being charged \$1,074.53 to appropriation “69X0201 Emergency Ship Construction Fund, U. S. M. C.”, and \$830.66 to “69-111/30023 Defense Aid, Vessels and Watercraft (Allot. to U. S. Mar. Com.) 1941-1943”.

On September 2, 1943, defendant demanded a refund of \$496.69 representing the difference between the full commercial rate and the land-grant rate on the shipments covered by bills of lading Nos. MC-16624, MC-16623, MC-16626, MC-16627 and [35] MC-16629.

Plaintiff refused the refund and defendant deducted the \$496.69 from bill No. F-27095-2. If this shipment was entitled to land-grant rates, the correct charges would be \$1,407.50, and deduction of \$496.69 from bill No. F-27095-2 was proper; if not, the charge of \$1,905.19 was correct, and no portion thereof should have been disallowed or deducted from bill No. F-27095-2 or from any other bill, and plaintiff is entitled to recover said sum of \$496.69.

Facts as to Bill No. F-11274-4:

Between April 18, 1942 and April 20, 1942, plaintiff delivered engine parts consigned between February 23, and April 6, 1942 by Joshua Hendy Iron Works, Sunnyvale, California. These shipments were covered by bills of lading Nos. MC-37295, MC-37321, MC-37322, MC-37325 and MC-37326, issued December 18, 1941.

These engine parts were purchased under contract No. MCc(ESP)-1020 dated April 16, 1941, for 200 hulls. The contract contained provisions similar to those referred to in contract No. MCc(ESP)-1028, which covered shipments referred to on bill No. F-10535-1. The engine parts here in question were moving for use in construction of U. S. M. C. hulls Nos. 64-94.

Plaintiff billed its charges for these shipments in its original bill No. F-11274-4 for \$1,556.35, representing the full commercial rate. The bill was paid in full, payment being charged \$877.78 to appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C.", and \$678.57 to "69-111/30023 Defense Aid, Vessels and Watercraft (Allot. to U. S. Mar. Com.) 1941-1943".

On September 11, 1943, defendant demanded a refund of \$405.75 representing the difference between the full

commercial rate and the land-grant rate on the shipments covered by bills of lading Nos. MC-37295, MC-37321, MC-37322, MC-37325 and [36] MC-37326. Plaintiff refused the refund and defendant deducted the \$405.75 from bill No. F-27095-2. If this shipment was entitled to land-grant rates, the correct charges would be \$1,150.60, and deduction of \$405.75 from bill No. F-27095-2 was proper; if not, the charge of \$1,556.35 was correct and no portion thereof should have been disallowed, or deducted from bill No. F-27095-2 or from any other bill, and plaintiff is entitled to recover said sum of \$405.75.

X.

Either party may object to the relevance or materiality of any facts herein set forth. Any of the documents referred to herein may be introduced in evidence (subject to objection as to relevancy or materiality) by either party, by photostatic copies without further proof of authentication.

Dated this 25 day of Oct., 1946.

FRANK KARR
C. W. CORNELL
E. D. YEOMANS

Attorneys for Plaintiff

JAMES M. CARTER
U. S. Atty.

RONALD WALKER and
CHARLES H. VEALE
Asst. U. S. Attys.

Attorneys for Defendant

[Endorsed]: Filed Oct. 25, 1946. Edmund L. Smith,
Clerk. [37]

[Title of District Court and Cause]

STIPULATION

Defendant claims that it has or may have several causes of action pleadable as counterclaims in this action.

Plaintiff and defendant agree that for the purpose of limiting the number of questions at issue herein, it is desirable to defer the litigation of the matters which defendant's counter-claims would put in issue.

Accordingly, plaintiff and defendant stipulate and agree:

If in any future action or proceeding, defendant should seek to recover on or establish any claims which might have been pleaded by way of set-off or counterclaim in this action, plaintiff will not plead as a defense thereto the omission of defendant to [38] plead such set-offs or counter-claims in this action.

Dated this 25 day of Oct., 1946.

FRANK KARR
C. W. CORNELL
E. D. YEOMANS

Attorneys for Plaintiff

JAMES M. CARTER
U. S. Atty.
RONALD WALKER and
CHARLES H. VEALE

Asst. U. S. Attys.

Attorneys for Defendant

[Endorsed]: Filed Oct. 25, 1946. Edmund L. Smith,
Clerk. [39]

[Title of District Court and Cause]

MEMORANDUM OF DECISION

Pacific Electric Railway Company, a common carrier by rail, has brought this suit under the Tucker Act [28 U. S. C. §41(20)] to recover the balance allegedly due on shipments of freight carried during the years 1941 to 1944. The freight consisted of various materials required for the construction of "Liberty" ships built for the United States Maritime Commission.

The shipments in controversy were carried on Government bills of lading, and were consigned to the United States Maritime Commission, at Los Angeles harbor.

As the last in a series of connecting carriers, plaintiff submitted bills for such transportation, basing the charges [40] on commercial tariff rates.

All carriers participating in the transportation services were either land-grant aided railroads, or were subject to rate equalization agreements "to accept land-grant rates for shipments [such as those involved in the case at bar] which the United States could alternately move over a land-grant road." [United States v. Powell, U. S. (March 3, 1947).] Releases permitted by the Transportation Act of 1940 [49 U. S. C. §65] had been filed by all land-grant carriers involved.

Hence the applicable rates are governed by §321(a) of the Act, which provided, prior to amendment in 1945 [79th Cong., 1st Sess., P. L. 256, c. 573, §3; 59 Stat. 607] that "the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the

foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use . . .” [49 U. S. C. §65(a).]

Maintaining that pursuant to the above-quoted provisions of §321(a) the shipments were entitled to land-grant rates, the Government paid plaintiff's freight bills accordingly. Plaintiff now seeks to recover the difference [41] between the land-grant rates and the full commercial rates.

Determination of whether the shipments in question were entitled to land-grant rates involves two questions: (1) Whether the materials covered by the bills of lading were the property of the United States at the time of shipment? and (2) if Government property, whether “military or naval property . . . moving for military or naval and not for civil use” within the meaning of §321(a)?

The recent decision by the Supreme Court in *Northern Pacific Ry. v. United States*, U. S. (March 3, 1947), is controlling as to the second question. If Government property, this court is bound by that precedent to hold the shipments entitled to land-grant rates pursuant to §321(a).

Most of the shipments were admittedly Government property at the time of carriage. As to these shipments, plaintiff has been fully paid.

However, as to the shipments covered by its freight bills Nos. F-10503-12, F-10610-1 and F-10540-1, plaintiff contends that title to the property did not pass to the Government until shipment was completed.

Bill No. F-10503-12 was for transportation on Government bill of lading MC-88579 issued November 25,

1941, covering steel plates furnished under contract MCc(ESP)-1520 between the Maritime Commission and Inland Steel Company. [42]

Bill No. F-10610-1 was for transportation on Government bills of lading MC-22992 and MC-19113. Bill of lading MC-22992, issued October 3, 1941, covered steel angles and steel channels furnished under contract MCc(ESP)-1145 between the Maritime Commission and Carnegie-Illinois Steel Corporation. Bill of lading MC-19113, issued September 19, 1941, covered steel plates furnished under contracts MCc(ESP)-1016 and MCc(ESP)-1083 between the Maritime Commission and Jones & Laughlin Steel Corporation.

Bill No. F-10540-1 was for transportation on six Government bills of lading, of which only MC-28270 and MC-34759 are in dispute. Bill of lading MC-28270, issued October 13, 1941, covered steel plates furnished under contract MCc(ESP)-1837 between the Maritime Commission and Otis Steel Company. Bill of lading MC-34759, issued December 11, 1941, covered steel sheets furnished under contract MCc(ESP)-2690 between the Maritime Commission and Youngstown Sheet & Tube Company.

It is the rule in most jurisdictions that the time of transfer of title as between seller and buyer is to be determined by the intention of the parties to be gathered from their conduct, the terms of the contract, the usages of the trade and other circumstances surrounding the transaction. [Uniform Sales Act, §§17, 18.] [43]

That all the shipments in controversy were on Government bills of lading would ordinarily indicate the parties intended that title pass to the buyer upon delivery to the carrier at point of shipment. "The general rule is that

title passes from seller to buyer with the delivery of the goods." [Louisville & Nashville R. R. v. United States, 267 U. S. 395, 400 (1925).] And in *United States v. Andrews*, 207 U. S. 229, 240 (1907), the Supreme Court held: "That as a general rule the delivery of goods by a consignor to a common carrier for account of a consignee has effect as delivery to such consignee is elementary."

However, the fact that goods are shipped on Government bills of lading is not conclusive as to Government ownership of the property. [*United States v. Galveston, Harrisburg & San Antonio Ry.*, 279 U. S. 401 (1929); *Louisville & Nashville R. R. v. United States*, supra, 267 U. S. at 398; *Henry H. Cross Co. v. United States*, 133 F. (2d) 183, 186 (C. C. A. 7th, 1943).]

Contract MCc(ESP)-1520 required that all shipments be made on Government bills of lading, that cash discounts were to be allowed on delivered price less transportation charges and that changes in freight rates were for the account of the buyer. These factors indicate an intention to pass title upon delivery to the carrier.

The contract further stipulated that the material was to be furnished in accordance with the seller's proposal [44] of June 27, 1941. That proposal provided, among other things, that if the Government desired to take advantage of land-grant rates, the buyer might take possession at the seller's plant and ship on Government bills of lading and the seller would deduct the regular commercial freight rates from the price. Such provisions also point to an intention to transfer title upon delivery to the carrier.

To the contrary, however, the contract expressly provided that the seller's responsibility for delivery would

not terminate until arrival of the material at destination and that: "Title to all of the products covered by this order will remain in the seller until delivery thereof has been made to the buyer at the destination herein named."

Contracts MCc(ESP)-1145, MCc(ESP)-1837 and MCc(ESP)-2690 also provided that all shipments were to be on Government bill of lading, but that title should remain in the seller until delivery at destination.

The usual indicia of intention become immaterial in the face of an express contractual provision reserving title in the seller during shipment.

The Government urges that the manifest inconsistency of reserving title in the seller and shipping by Government bill of lading is but an "oversight". Be that as it may, the law does not permit a court to read out of a contract language expressly reserving title in the seller until delivery at [45] destination.

The record here indicates that it was not until December of 1942 that the Maritime Commission thought of claiming land-grant rates; whereas the contracts in question were negotiated, and the relevant bills of lading were issued a year or more prior to that time.

"Congress, by writing into §321(a) an exception, retained for the United States an economic privilege of great value." [Northern Pacific Ry. v. United States, supra, U. S. at] But "oversight" on the part of the Maritime Commission in the drafting of contracts cannot defeat plaintiff's right to the full commercial rates for transportation of "military or naval" materials which were not the property of the Government at the time of shipment. [United States v. Galveston, Harrisburg & San Antonio Ry., supra, 279 U. S. at 405; Louisville & Nashville R. R. v. United States, supra, 267 U. S. at 401.

Cf. Oregon-Washington R. R. & Nav. Co. v. United States, 255 U. S. 339 (1921).]

Contracts MCc(ESP)-1083 and MCc(ESP)-1016 set forth a schedule of destination prices and provide that if shipment be made on Government bills of lading the price would be the destination price less an allowance for commercial rate of freight. The materials involved were shipped on Government [46] bills of lading, and the contracts contain no provision reserving title in the seller until delivery at destination. Thus the usual indicia of intention govern, and it must be held that the parties intended passage of title upon delivery to the carrier. Accordingly, the shipment covered by Government bill of lading MC-19113 was entitled to move at land-grant rates, and plaintiff has been fully paid as to that shipment.

Inasmuch as the materials furnished under contracts MCc(ESP)-1520, MCc(ESP)-1145, MCc(ESP)-1837 and MCc(ESP)-2690 were not the property of the United States at the time of shipment, hence not entitled to transportation at land-grant rates, plaintiff is entitled to recover \$1,143.66 representing the unpaid balance—the difference between the full commercial rates and the land-grant rates—on shipments covered by Government bills of lading MC-88579, MC-22992, MC-28270 and MC-34759.

Counsel for plaintiff will submit findings of fact, conclusions of law and judgment pursuant to local rule 7 within ten days.

May 19, 1947.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed May 19, 1947. Edmund L. Smith, Clerk. [47]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW

The above case came on regularly for trial on the 29th day and 30th day of October, 1946, before the Honorable William C. Mathes, Judge presiding, sitting without a jury, Frank Karr, C. W. Cornell and E. D. Yeomans appearing as attorneys for plaintiff, James M. Carter, United States Attorney, by Charles H. Veale, Assistant United States Attorney, George Galland, Attorney, United States Maritime Commission, and Hubert H. Margolies, Attorney, United States Department of Justice, appearing for defendant, and the parties having filed a Stipulation of Facts and a Stipulation limiting the issues, and additional oral and documentary evidence having been introduced, [48] and the Court having considered the same and heard the arguments of counsel and being fully advised, and having rendered a Memorandum of Decision, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

That the facts contained in paragraphs I, II, III, IV, V, VI, VII, VIII, and IX of the Stipulation of Facts filed herein are true, and said Stipulation of Facts is by reference incorporated and made a part of these findings.

CONCLUSIONS OF LAW

From the foregoing facts, the Court makes the following conclusions of law:

I.

That all the shipments involved in this action were shipments of "military or naval property moving for military or naval and not for civil use" within the meaning of Section 321(a) of the Transportation Act of 1940.

II.

That all the shipments involved in this action, except shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were property of the United States at the time of shipment.

III.

That the shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were not the property of the United States at the time of shipment.

IV.

That defendant was entitled to land-grant rates on all the shipments involved in this action other than the shipments covered by Government bills of lading Nos. MC-88579, [49] MC-22992, MC-28270 and MC-34759.

V.

That the plaintiff is entitled to full commercial rates on the shipments covered by Government bills of lading Nos. MC-88579, MC-22992; MC-28270 and MC-34759.

VI.

That plaintiff is entitled to recover from the defendant the sum of \$1,143.66, said sum being the difference between full commercial rates and land-grant rates on shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759.

Dated this 4 day of September, 1947.

WM. C. MATHES

Judge

Approved this 3 day of September, 1947. James M. Carter, United States Attorney; by Charles H. Veale, Assistant United States Attorney.

[Endorsed]: Filed Sep. 5, 1947. Edmund L. Smith, Clerk. [50]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4256-WM Civil

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above case came on regularly for trial on the 29th day and 30th day of October, 1946, before the Honorable William C. Mathes, Judge presiding, sitting without a jury, Frank Karr, C. W. Cornell and E. D. Yeomans appearing as attorneys for plaintiff, James M. Carter, United States Attorney, by Charles H. Veale, Assistant United States Attorney, George Galland, Attorney, United States Maritime Commission, and Hubert H. Margolies, Attorney, United States Department of Justice, appearing for defendant, and the parties having filed a Stipulation of Facts and a Stipulation limiting the issues, and additional oral and documentary evidence having been introduced, and the Court having considered the same and heard the arguments [51] of counsel and being fully advised, and having rendered a Memorandum of Decision, and having made its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed:

I.

That all the shipments involved in this action were shipments of "military or naval property moving for

military or naval and not for civil use" within the meaning of Section 321(a) of the Transportation Act of 1940.

II.

That all the shipments involved in this action, except shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were property of the United States at the time of shipment.

III.

That the shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were not the property of the United States at the time of shipment.

IV.

That defendant was entitled to land-grant rates on all the shipments involved in this action other than the shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759.

V.

That the plaintiff is entitled to full commercial rates on the shipments covered by Government bills of lading [52] Nos. MC-88579, MC-22992, MC-28270 and MC-34759.

VI.

That plaintiff recover from defendant the sum of \$1,143.66, said sum being the difference between full commercial rates and land-grant rates on shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759.

Dated this 4 day of September, 1947.

WM.C.MATHES
Judge

Approved this 3 day of September, 1947. James M. Carter, United States Attorney; by Charles H. Veale, Assistant United States Attorney.

Judgment entered Sep. 5, 1947. Docketed Sep. 5, 1947. C. O. Book 45, page 277. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

Received copy of the within this 16th day of June. Charles H. Veale, Asst. U. S. Atty., Attorney for Deft.

[Endorsed]: Filed Sep. 5, 1947. Edmund L. Smith, Clerk. [53]

[Title of District Court and Cause]

NOTICE OF APPEAL

You Will Please Take Notice that the United States of America, defendant and appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above-entitled District Court entered September 5, 1947, in favor of plaintiff and against said defendant, and from the whole thereof.

JAMES M. CARTER
United States Attorney

RONALD WALKER
Assistant United States Attorney
Attorneys for Defendant and Appellant

[Endorsed]: Filed & mld. copy to Karr, Cornell & Yeomans, Attys. for Pltf., Dec. 2, 1947. Edmund L. Smith, Clerk. [54]

[Title of District Court and Cause]

NOTICE OF APPEAL

You Will Please Take Notice that the plaintiff, Pacific Electric Railway Company, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from so much of the judgment of the above entitled action, entered September 5, 1947, as contained in paragraphs I, II and IV thereof by which it denies plaintiff full commercial rates on all shipments other than those mentioned in paragraphs III, V and VI of said judgment.

Dated this 4th day of December, 1947.

FRANK KARR
C. W. CORNELL
E. D. YEOMANS

By E. D. Yeomans

Attorneys for Plaintiff

[Endorsed]: Filed & mld. copy to Ronald Walker, Asst. U. S. Atty., Dec. 4, 1947. Edmund L. Smith, Clerk. [55]

[Title of District Court and Cause]

STIPULATION AND ORDER EXTENDING TIME
TO DOCKET CAUSE ON APPEAL

It Is Hereby Stipulated by and between the parties hereto, by and through their respective attorneys, that the time within which to file the record and docket the appeals in the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit may be extended to and including the 16th day of February, 1948.

Dated this 9 day of January, 1948.

FRANK KARR

C. W. CORNELL

E. D. YEOMANS

By E. D. Yeomans

Attorneys for Plaintiff-Appellant

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

By Arline Martin

Attorneys for Defendant Appellant

It Is So Ordered.

Dated this 9 day of January, 1948.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Jan. 9, 1948. Edmund L. Smith,
Clerk. [56]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 60, inclusive, contain full, true and correct copies of Petition; Answer; Stipulation of Facts; Stipulation; Memorandum of Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal of Defendant; Notice of Appeal of Plaintiff; Stipulation and Order Extending Time to Docket Appeal; Stipulation Designating Contents of Record on Appeal and Defendant's Statement of Points on Appeal which, together with copy of Reporter's Transcript of Proceedings on October 30, 1946 and original Plaintiff's Exhibit No. 1 and Defendant's Exhibits A-1, A-2, A-3, A-4, A-5, B for identification and C for identification, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.60, one-half of which sum has been paid to me by the plaintiff-cross-appellant.

Witness my hand and the seal of said District Court this 27 day of January, A. D. 1948.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 30, 1946

Appearances:

For the Plaintiff: Frank Karr, Esquire, C. W. Cornell, Esquire, and E. D. Yeomans, Esquire.

For the Defendant: Hubert H. Margolies, Esquire, for Department of Justice; George F. Galland, Esquire, for Maritime Commission.

Los Angeles, California, October 30, 1946. 10:00 A. M.

(Case called by the clerk for trial.)

The Court: Are both sides ready, gentlemen?

Mr. Yeomans: Yes, your Honor; we are ready to proceed.

Mr. Margolies: Yes, sir.

Mr. Yeomans: I take it, of course, that there is not any necessity of reviewing in a general way the nature of the case because we have had it up a couple of times and we have filed briefs.

The Court: Yes; and I have read the briefs, Mr. Yeomans.

On this question of the burden of proof, it seems to me that there is nothing in the Statute which would take the burden away from the plaintiff, in view of the legislative history and even the formation of the Statute itself, which means that the plaintiff, in order to impose a

liability upon the Government, would have to have the burden of eliminating the suit from the military or naval category.

There may be a burden in certain instances upon the Government to come forward with evidence. Of course, under our New Rules that is not so important, because you can learn what the other fellow knows pretty well, anyhow.

Mr. Yeomans: We will be very glad to have you make a [2*] particular ruling on that question. I will mention that when we get to the point of arguing about the case particularly.

It is our position, of course, that the burden of proof question goes beyond the burden of coming forward; that it is a question of the burden of proving the issue.

But, as I say, when we get to argument I will mention that again. And we would like, though, in any event to have the court rule on the question, along with the broader issues, so that possibly we can get a final determination on that point which is important to us in the rest of our litigation on this subject.

Before getting into the argument, we have a few little evidentiary matters which we would like to get in to complete the record; and I think probably that we might as well proceed and get those into evidence, and then we can go ahead with our arguments.

The Court: I will rule at this time, Mr. Yeomans, that the burden of proof is upon the plaintiff. I notice

*Page number appearing at top of page of original Reporter's Transcript.

your petition does not plead around the exception to the Statute.

Mr. Yeomans: No; it does not.

The Court: In view of that ruling, you might want to amend.

Mr. Yeomans: No; we do not want to amend. We want [3] to have that issue squarely presented.

As I say, we are going to present argument on that question further, which has been presented since these memoranda—not in addition to that, but as a part of our argument, that is one of the points we wish to present, and possibly the court might reserve its ruling on that question and include it as a part of the decision in the case.

The Court: Yes; I would prefer to do that. I thought you wished me to make a ruling at this time.

Mr. Yeomans: Well, we did. We did wish to have it made well in advance of trial so we would be in a position to know, but since it has passed that stage and we are here at trial, it really becomes now a part of the case, because we have appeared to the extent to which the evidence is going to be offered, and then it is just a question of what conclusion the court is going to draw from that evidence.

The Court: Yes. As I recall, neither the petition filed by the plaintiff nor the answer of the defendant—the petition does not plead around the exception, and the answer of the defendant does not set up the exception as an affirmative defense.

Mr. Yeomans: We have taken the position, I think both the defendant and the plaintiff, that the pleadings have [4] become somewhat unimportant in view of the stipulation we have entered into.

The question was raised as to whether the defendant should amend its answer, and I think, clearly, the answer does not even present the issue. But they advised that in view of the stipulation of facts, that the stipulation itself states the issues; and we have really framed issues by the stipulation rather than by the petition and answer. In other words, the stipulation says if certain things are found to be true, the plaintiff is entitled to recover; if not, the plaintiff gets nothing.

Now, by that stipulation in that manner, it has been my impression, and I thought it was the defendant's impression, that we have by stipulation stated the issues for the court to determine.

The Court: I do not suppose there will be any question that the case is tried upon the assumption that the issues are framed as set forth in the stipulation. There won't be any pleading problem in the case, I should think.

Mr. Yeomans: I think that the defendant is as interested in getting a determination of these issues as the plaintiff is to dispose of the principal question rather than on mere technical rules of pleading.

The Court: The reason I raised the question, I had in [5] mind the appellate courts, not this court.

Mr. Yeomans: That is right.

The Court: As far as I am concerned, I think the issues are squarely here to be determined and that the stipulation, being a pre-trial document, is in effect a settlement of the issues.

Mr. Yeomans: I might ask the counsel for the defendant if that is his understanding, that the stipulation itself presents the issues that we are expecting to have determined, so there won't be any question. Or is there going to be some question as to the issues as raised by the petition and answer?

Mr. Margolies: During the summer this question came up, and we agreed with Mr. Yeomans that in view of the supersedence of the joinder of issues through the pleadings by the framing of the issues by the stipulation, there was no point to an amendment of the pleadings; that we felt we would have difficulty to file an amended answer. But we do think the issues were joined by the stipulation; that the stipulation presented the matter probably more residually and directly than the technical procedure of reaching issues through the filing of an amended petition and an amended answer.

The Court: Yes. But that state of the pleadings brings us back to the burden of proof problem. The plaintiff takes [6] the position that you can set up the exception to the Statute as a burden of proof on the defense, I suppose; and the defendant takes the position that the defendant should plead around the exception to the Statute.

Mr. Margolies: Your Honor will understand that if we were to set up the exception as affirmative defense, rather than through our general denial, it might be a case of invited error; and our position has been at the outset that it is plaintiff's duty to establish its right to recover, and that it cannot say that the burden of proof is upon the Government, or the affirmative is upon the Government to establish that this was not property of the United States.

Basically, the question relates to whether or not there were undercharges or overcharges, and plaintiff sues for a withholding.

The Court: Are you agreed, gentlemen, that the case will be tried now upon the issues as raised by the stipulation on file?

Mr. Yeomans: That is perfectly agreeable to the plaintiff.

Mr. Margolies: And likewise to the defendant.

The Court: Very well. Identify that stipulation.

Mr. Yeomans: There are two stipulations. The Stipulation of Facts is the one that we are referring to. [7] There is another stipulation.

The Court: This stipulation we are speaking of now is a "Stipulation of Facts" filed October 25, 1946, which is a document comprising 22 pages. There was a two-page stipulation filed on the same date with respect to the counterclaim.

Mr. Yeomans: That is correct.

The Court: Very well, gentlemen. The plaintiff may proceed.

Mr. Yeomans: And it is understood, then, that the stipulation is in evidence and, of course, may be considered as the evidence in the case or as introduced into evidence?

The Court: Yes.

Mr. Yeomans: There is one other phase of evidence that the plaintiff would like to offer. It is one of the contracts between the Maritime Commission and California Shipbuilding Corporation, being contract MCc-7785, dated March 14, 1941, which contract is referred to on page 2, line 4 of the Stipulation of Facts; and which contract contains, attached to it, a letter dated June 30, 1942 from E. S. Land, Chairman to California Shipbuilding Corporation, and an Addendum No. 1, dated March 19, 1941.

We would like to offer this contract into evidence as the plaintiff's first exhibit, whatever number.

The Court: Is there objection? [8]

Mr. Margolies: No, sir.

The Clerk: Plaintiff's Exhibit No. 1.

[Note: Plaintiff's Exhibit No. 1 will be found at page 84 of the Transcript of Record.]

The Court: The document will be received into evidence and marked Plaintiff's Exhibit No. 1, Mr. Clerk?

The Clerk: Yes, your Honor.

Mr. Yeomans: And it is understood that, although that is not an executed copy, the parties agree that it is a true and correct copy of the original document?

Mr. Margolies: That is agreed.

The Court: Is that correct?

Mr. Margolies: Yes.

The Court: Is this a typical contract?

Mr. Yeomans: That is what I was just going to next mention. That it is also stipulated by the parties that this contract is typical of the other contracts between the Maritime Commission and California Shipbuilding Corporation referred to in the Stipulation of Facts, except that possibly insofar as the Stipulation of Facts it has specifically references to differences between these contracts. Is that correct?

Mr. Margolies: Agreed to by defendant.

Mr. Yeomans: With that and the Stipulation of Facts the plaintiff rests.

The Court: Does the defendant have any further evidence? [9]

Mr. Margolies: We have some evidence.

There are three bills in this suit as to which the issue depends to some extent on whether the title was in the United States at the time of moving.

The Government wishes to introduce into evidence the five bills of lading which are in this exhibit; and they are General Accounting Office page C-15, which is bill of lading MC-88579; General Accounting Office page C-22, bill of lading MC-22992; General Accounting Office page C-27, bill of lading MC-19113; General Accounting Office page C-31, bill of lading MC-28270; and General Accounting Office page C-35, bill of lading MC-34759.

The General Accounting Office exhibit consists of pages C-1 to C-45, but we are introducing only the five papers that I have requested, namely, pages C-15, C-22, C-27, C-31, and C-35, which are the five bills of lading which are as to which the title to the property is disputed.

The Court: Is it possible to remove those?

Mr. Margolies: It is rather difficult to do. We would be very glad to do it so we would have it for further use.

Mr. Yeomans: I think we might as well tear off the Great Seal. I do not object to their being a true copy, and I have no objection to their admission as evidence.

The Court: As I understand, it is correct, then, to [10] refer to these documents which you offer, as bills of lading covering the shipments as to which the plaintiff contends the Government did not have title at the time the shipments were consigned?

Mr. Margolies: That is true. There are three carrier bills involving six contracts and five bills of lading, and we are introducing only five bills of lading.

The Court: Is that a correct statement, Mr. Yeomans?

Mr. Yeomans: That is a correct statement. And we have no objection that the copies offered by the defendant are true and correct copies of the original bills.

The Court: In view of Mr. Yeoman's suggestion, I would suggest you just detach the ones you are offering and we will mark them Defendant's Exhibits A—how many are there?

Mr. Margolies: There are five, five bills of lading and I have read their numbers.

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

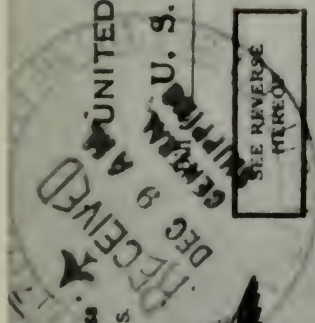
Mr. Yeomans: No objection.

The Court: They will be received into evidence.

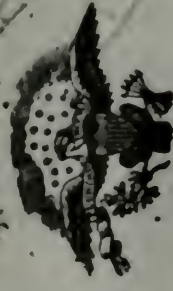
Date 11/10/46 AI
 Clerk U. S. Dept. of Com. & Contr., Sou. Dist. of Calif.
 Deputy Clerk

MC- 88579
 21626

UNITED STATES OF AMERICA
 U. S. MARITIME COMMISSION



Standard Form No. 1025
 Form Approved by
 Comptroller General U. S.
 August 24, 1928



(Department of State, War, and Navy)

DIVISION OF PURCHASE AND SUPPLY

F. E. HICKEY, Director
 (Name and title of issuing officer)

NOVEMBER 25 1946
 (Date issued)

RETURNED FROM Inland Steel Company- Indiana Harbor Works,
 (Contractor)

GOVERNMENT BILL
 OF LADING
 ORIGINAL

by the Indiana Harbor Belt Railroad Company, the public property hereinafter described,
 in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse
 hereof, from Indiana Harbor, Indiana to Terminal Island- Los Angeles Harbor
 (Shipping point) (Destination)

by the said company and connecting lines, there to be delivered in like good order and condition to
United States Maritime Commission AT: California Shipbuilding Corporation

Via IHB- ORIP - Southern Pacific RR o/o Pacific Electric Ry
 (Route journey only when some substantial interest of the Government is subserved thereby)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification, or technical names)	WEIGHTS*

Steel Plates. for USMC Design EO-8 EO-1

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Standard Form No. 1048
Form Approved by
GSA, General Reg. No. 27
April 14, 1957



RECEIVED
DEC 9 AM 10:30
GENERAL INVESTIGATIVE
DIVISION U. S. MARITIME COMMISSION

UNITED STATES OF AMERICA
MARITIME COMMISSION

MC- 88579
21026

(Name and title of issuing office)
DIVISION OF PURCHASE AND SUPPLY

F. E. HICKEY, Director

GOVERNMENT BILL OF LADING

ORIGINAL
by the Indiana Harbor Belt Railroad Company,
(Name of transportation company)
in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse
hereof, from Indiana Harbor, Indiana to Terminal Island - Los Angeles Harbor California
(Origin) (Destination)
by the said company and connecting lines, there to be delivered in like good order and condition to

United States Maritime Commission AT: California Shipbuilding Corporation

IND- CRP - Southern Pacific RR a/o Pacific Electric Ry
(Route for use of the Government in its service)

MARKS	NUMBERS ON PACKAGES	NUMBERS AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Shewie article carrier a freight classification, Avoid trade or technical names)	WEIGHTS*
			Steel Plates. for UEMG Design EO-8	80-1
	623 Pcs			66,130#
			CIM Bureau weight agreement No 4517	
			Inland Steel B/L 64188- Issued 18-9-41	

Pick-up service at origin was furnished by the Government.

Size car ordered _____ ft. Size car furnished _____ ft. Date furnished _____ (Signature of Consignor) Car No. 40041

TARIFF AUTHORITY (To be filled in by general office rendering account) _____ Initial PALE Car No. 40041

Authority for shipment _____ (Signature of Consignor) _____

Route order No. MO- 2071 CERTIFICATE OF ISSUING OFFICER

Contract No. MO(ESP) 1880 or Purchase Order No. _____, dated August 18th, 1941

Indiana Harbor, Indiana - Ft. Wayne, Ind. (Place of origin) (Place of destination)

I have this day received from California Shipbuilding Corporation (Name of transportation company)

at Terminal Island - Los Angeles Harbor, Calif. (Actual point of delivery by carrier) the public property described in this Bill of Lading.

In apparent good order and condition, except as noted on the reverse hereof. Delivery service at destination was not by the Government.

Weight Sixty-six Thousand One hundred and thirty pounds (In figures) 66,130 pounds. (In figures) 66,130 pounds.

CARRIER'S RIGHTS TO SUITING FOR LOSS OR DAMAGE TO GOODS IN TRANSIT RESERVED. (Name of transportation company)
CALIFORNIA SHIPBUILDING CORPORATION (Name of carrier)
DATE OF DELIVERY DEC 2 9 1941 (Date)
Per PALE (Signature)

*Weights also shall be measured for shipments via ocean carriers. (When this information is case of such-laden shipments only. Charges to be billed to the Department of Establishment and Bureau of Service named above as authorized Government warehouse from the carrier's bills.)

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Monday, January 9, 1942
 MAIL ROOM, U. S. DEPT. OF COMMERCE
 WASHINGTON, D. C.



RECEIVED

JAN 9 1942

U. S. MARITIME COMMISSION

ONE REVERSE
 BEERIF

GOVERNMENT BILL

OF LADING

ORIGINAL BESSEMER & LAKE ERIE RAILROAD

19 41

F. E. HICKEY, Director

(Name of transportation company)

from **CARNegie ILLINOIS STEEL CORP**

(Date of transportation)

October 3

MUNHALL PA

(Shipping point)

SHIPBUILDING CORPN TERMINAL ISLAND

via **URR & BAILE & NYCASTL & GMSO & SP & PE**

(Route journey only when some substantial interest of the Government is subserved thereby)

the public property hereinafter described,
 to be forwarded subject to condition stated on the reverse

to **LOS ANGELES HARBOR CALIF**

(Destination)

CALIFORNIA

(Consignee)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification, Avoid trade or technical names)	WEIGHTS
		60	STEEL ANGLES	40 584
		3	STEEL CHANNELS	

Pick-up service at origin was not by the Government.

Signature of Consignor: **40-0-65089-90 12-29-41**

Size of car ordered

Initials **BALE** Car No. **36724**

(To be filled in by general office rendering account)

Bessemer and Lake Erie Railroad Company.

AUTHORITY FOR SHIPMENT

Route Order No. **MC-509**

CERTIFICATE OF ISSUING OFFICER

Contract No. **MC-ESP-1145** dated **6-20-41**

LOS ANGELES HARBOR CALIF freight **allied**

MIS (To be filled in by carrier)
 (To be filled in by general office rendering account)
 SHIPPER'S RIGHTS TO SHIPPING CHARGES NOT APPLICABLE TO **PULLMAN** **ADDITIONAL** **OFFICE** **ASSISTANT**

I have this day received from **Pacific Electric Railway**

at **Terminal Island, Los Angeles Harbor, Calif.** this public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof. Delivery service at destination was not by the Government.

Weight **Forty Thousand, Five Hundred and Eighty-Four** pounds, was not by the Government.

CALIFORNIA SHIPBUILDING CORPORATION

JAN 23 1942 (Date)

where this public government property is shown where inspected
 (Actual point of delivery by carrier)
 (To be filled in by carrier)
 (To be filled in by general office rendering account)
 (To be filled in by carrier)
 (To be filled in by general office rendering account)
 (To be filled in by carrier)
 (To be filled in by general office rendering account)

C-22

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Revised Form No. 100
FEBRUARY 1941
Approved by the
War Relocation Authority



SS-212
UNITED STATES OF AMERICA
1892

Bill to U. S. MARITIME COMMISSION
(Department of Establishment and Bureau of Services)
EMERGENCY SHIP CONSTRUCTION FUND, U. S. M. C.
(Appropriation (Chargeable))
DIVISION OF PURCHASE AND SUPPLY
(Issuing office)

GOVERNMENT BILL
OF LADING

F. E. HICKEY, Director
(Name and title of issuing office)

September 19, 1941
(Date issued)

Arrested from Jones & Laughlin Steel Corporation
(Consignor)

the public property hereinafter described,

ORIGINAL Pennsylvania Railroad Company
(Name of transportation company)

in apparent good order and condition (contents and value unknown), to be forwarded subject to condition stated on the reverse

hereof, from Pittsburgh, Pennsylvania to Terminal Island

LOS ANGELES Harbor, California

by the said company and connecting lines, there to be delivered in like good order and condition to California
(Destination)

Shipbuilding Corporation.

via PRR - MKT - SP - PE

(Route journey only when some substantial interest of the Government is subserved thereby)

127

MARKS	NUMBERS ON PACKAGES	NUMBERS ON PACKAGES AND PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification, Avoid trade or technical terms)	WEIGHTS
PRR 100	44 Pos. MCC (RSP) 1016 MCC (RSP) 1083	44 Pos. MCC (RSP) 1016 MCC (RSP) 1083	Steel Plates 21 Pos. 66270# 23 Pos. 56050#	122330#

Pick-up service at origin was by the Government.

(Signature of Consignor)

Site of car ordered ft. Size car furnished ft. Date furnished

TARIFF AUTHORITY

(To be filled in by general office rendering account)

Initials

Car No.

AUTHORITY FOR SHIPMENT

MC-2722

CERTIFICATE OF ISSUING OFFICER

(To be filled out when this bill of lading is issued by carrier)
Contract No. Good Pittsburgh Pac. Traffic of Purchase Order No. MC 2722 dated 5-17-41
point when in course of shipment

CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY THIS BILL OF LADING
I have this day received from Pacific Electric Railway
(Name of transportation company)
at Terminal Island, Los Angeles Harbor, Calif., the public property described in this bill of lading, in apparent
good order and condition, except as noted on the reverse hereof. Delivery service at destination was not by the Government.
Weight One Hundred Twenty-two Thousand Three Hundred and Twenty pounds. 122,320 lbs. net weight
CALIFORNIA SHIPBUILDING CORPORATION
(Name of consignor)
Traffic Manager
(Name of consignee)
JAN 2 1942
19

THIS BILL OF LADING IS VALID FOR SHIPMENT OF GOODS ONLY AND IS NOT VALID FOR THE TRANSPORTATION OF PASSENGERS OR FOR THE TRANSPORTATION OF PERISHABLE OR HAZARDOUS GOODS.
It is the responsibility of the shipper to ensure that the goods are properly packed and secured for shipment.
Changes in the Department of Maritime Administration and Service by Service advised

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Standard Form No. 1048
 Form Approved by
 the Federal Bureau of Investigation
 January 28, 1939



UNITED STATES OF AMERICA
 DEPARTMENT OF COMMERCE
 DIVISION OF PURCHASE AND SUPPLY

MC-28270

Bill to

U. S. MARITIME COMMISSION

DEC 11 1941

Department of Maritime and Commerce for the United States
 CALIFORNIA SHIP BUILDING CO. INC.
 (Appropriation character)

SEE REVERSE
 HEREOF

DIVISION OF PURCHASE AND SUPPLY

GOVERNMENT BILL
 OF LADING

F. E. HICKEY, Director
 (Name and title of issuing office)

October 11, 1941
 (Date issued)

ORIGINAL

Received from

THE OTIS STEEL CO. RIVERSIDE WORKS
 (Consignor)

by the WHEELING & LAKE ERIE RY. CO.
 (Name of transportation company)

In apparent good order and condition (contents and value unknown), to be delivered in like good order and condition in accordance with the reverse hereof, from CLEVELAND, OHIO to HARBOR, CALIFORNIA

(Destination)

SHIPBUILDING CO., TERMINAL ISLAND, LOS ANGELES HARBOR, CALIFORNIA
 (Consignee)

THE WLE NYC ST. & CRIP SPA PACIFIC ELECT.

(Goods bearing only when some administrative interest of the Government is authorized thereby)

MARKS	NUMBERS AND PACKAGES	DESCRIPTION OF ARTICLES (Observes articles and condition, Avoid trade or technical names)	WEIGHTS
	176	STEEL PLATES DAMAGE SOOF	28600

Pick-up service at origin was not by the Government. OTIS STEEL CO. SHIPPER

Size of car ordered ft. Size car furnished ft. Date furnished
 TARIFF AUTHORITY

Initials P. O. R. Car No. 701360

(To be filled in by consignor after receiving account)
 AUTHORITY FOR SHIPMENT

(Name of transportation company)
 Wheeling & Lake Erie Ry. Co.
 12-21-41 Per E. D. Shenk, Agt.
 (Agent)

Contract No. WCC(ESP)1837, or Purchase Order No.

SEPT 8 1941

CLEVELAND, OHIO

1941

(U. S. R. point named in contract)

CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY THIS BILL OF LADING

I have this day received from

CONSIGNEE'S CERTIFICATE OF DELIVERY
 PACIFIC ELECTRIC RAILWAY

at Terminal Island, Los Angeles Harbor, Calif.

in apparent good order and condition, except as noted on the reverse hereof, delivery service of destination was not by the Government. Weight Eighty-Two Thousand, Six Hundred and Eighty pounds.

CALIFORNIA SHIPBUILDING CORPORATION

JAN - 6 1942 19

THIS BILL OF LADING IS VALID FOR ALL PURPOSES UNLESS IT IS ALTERED OR CANCELLED BY THE ISSUING OFFICE. CHANGES TO BE MADE IN THE DEPARTMENT OF COMMERCE AND MARINE AFFAIRS BUILDING.

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Shipping Receipt No. 1144
 U. S. MARITIME COMMISSION
 WASHINGTON, D. C.
 January 24, 1941



**GOVERNMENT BILL
 OF LADING**

ORIGINAL
 by the

UNITED STATES OF AMERICA
 21761
 U. S. MARITIME COMMISSION
 (Department or Establishment and Bureau or Service)

SEE REVERSE
 SIDE ONLY

(Appropriation Mark optional)

DIVISION OF PURCHASE AND SUPPLY

F. E. HICKEY, Director
 (Name and title of issuing office)

December 11, 1941
 (Date issued)

Received from **Youngstown Sheet & Tube Company**

(Company name)

the public property hereinafter described,

in appassant good order and condition (contents and value unknown), to be forwarded subject to condition stated on the reverse

hereof, from **Youngstown, Ohio** to **Los Angeles Harbor, Calif.**

by the said company and connecting lines, there to be delivered in like good order and condition to **United States**

Maritime Commission of California Shipbuilding Corp., Terminal Island

340 of ORIAS of 30W PAC of Pacific Elec. Ry.

(In triplicate parts)

(Name of transportation company)

(Name of transportation company)

(Name of transportation company)

(Name of transportation company)

(Name of transportation company)

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(Name of transportation company)

(Name of transportation company)

(Name of transportation company)

NUMBER AND KIND OF PACKAGES

165 pos.

Steel Sheets

Car Seals - 590099

590100

206904

DESCRIPTION OF ARTICLES
 (Observe strictly carrier's freight classification. Avoid trade or technical names)

WEIGHTS

RECEIVED

U. S. MARITIME COMMISSION

JAN 2 1941

INSPECTION SECTION
 TERMINAL ISLAND

Place of service at origin was not by the Government.

(Signature of Consignor)

Slits of car ordered 40' 6" Slits car furnished 40' 6" Date furnished 12/23 Initials FBR Car No. 64940

TAJURY ATTRIBUTED TO THE BALTIMORE & OHIO NATIONAL COMPANY.

(Name of transportation company)

ROUTE ORDER NO. **YOUNGSTOWN 7043**

1726, 1941 Per F.H. H. (initials)

CERTIFICATE OF ISSUING OFFICE

to be filed with this bill of lading to be used by contractor in making shipment

or Purchase Order No. **200 (207) 2590**, dated **11/27/41**

Contract No.

Youngstown, Ohio

(If O. R. point named in contract)

FOR E. T. DILLON, Administrative Assistant

Pacific Electric Railway

CALIFORNIA SHIPBUILDING CORPORATION

Delivery service at destination was not by the Government

Weight Twenty Thousand, Six Hundred and Ninety pounds.

20,690.4

JAN - 18 1941

(Date)

(Signature)

(Name)

(Address)

(City)

(State)

2-35

Mr. Margolies: Defendant has two copies of resolutions passed by the Maritime Commission. The first is dated December 4, 1942 and recites the resolution by the Maritime Commission that property after December 7, 1941 was military property for the United States moving for military or naval, and not for civil use; and reciting that theretofore there was no basis—

Mr. Yeomans: I do not care to interrupt. I take it [12] that you are not offering evidence now while you are counsel. Of course, as to those, we are going to object to these—not as to the fact that these resolutions were passed and that these are correct copies, but we are going to object to the admissibility of these resolutions. Not meaning to interrupt counsel.

The Court: As being incompetent?

Mr. Yeomans: Incompetent, irrelevant and immaterial, conclusions of the agent of the defendant.

The Court: You have identified it sufficiently, Mr. Margolies. Will you hand it to the clerk?

Mr. Yeomans: And if it is offered, I would like to formally make that objection, that the resolution is incompetent, irrelevant and immaterial; it is a conclusion of the party as to a matter which is at issue in the case.

The Court: There is no objection to the foundation?

Mr. Yeomans: No objection at all to the foundation.

The Court: Where does the date appear?

Mr. Margolies: The date does not appear, but counsel will not contest that it was passed as of December 4, 1942. He has seen the copy before and we noticed the oversight.

Mr. Yeomans: Yes. I will stipulate that the resolution offered was of that date passed by the Maritime Commission, and that represents a true copy of what was

passed. But we object to its introduction into evidence [13] for the reasons I have stated.

Mr. Galland: May I interrupt for just a moment? I think it had better be understood that it was passed on December 4th, rather than as of December 4th.

Mr. Yeomans: Passed on December 4th. That is what I meant to say.

The Court: Passed on December 4, 1942, and you make that stipulation subject to your objection.

Mr. Yeomans: That is correct. This involves a matter of some legal argument, which possibly, if it is agreeable, might be reserved for the determination after we have argued on that point. The defendant has cited a number of cases and I would like to go through and refer to some of those cases that have been cited in support of the effect of this document, and possibly the thing that would be advisable would be to reserve ruling on these matters until the court has heard us on that question.

The Court: Very well. The resolution of December 4, 1942 will be marked at this time Defendant's Exhibit B for identification, and the court will reserve ruling on the offer into evidence of Defendant's Exhibit B for identification.

[DEFENDANT'S EXHIBIT B IDENTIFICATION]

UNITED STATES [Crest] OF AMERICA
UNITED STATES MARITIME COMMISSION

Washington, May 3, 1946

I hereby certify that the annexed Resolution is a true and correct copy of a Resolution, the original of which is on file in the United States Maritime Commission.

(Defendant's Exhibit B Identification)

In Witness Whereof, I have hereunto set my hand, and caused the seal of the United States Maritime Commission to be affixed, on the day and year first above written.

(Seal)

[Illegible]

Assistant Secretary United States Maritime
Commission.

RESOLUTION

Whereas, pursuant to the provisions of the Merchant Marine Act, 1936, as amended, and acts subsequent and supplemental thereto, funds have been made available to the Commission for the construction of merchant vessels of such types, size and speed as the Commission may determine to be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries;

Whereas, the Commission, in carrying out the foregoing purposes, has procured and is procuring, either directly or through its agents and contractors, materials, equipment and supplies for use in the construction of such vessels on the basis of contracts or orders providing for passage of title and delivery to the Commission to such material, equipment and supplies at the point of manufacture thereof;

Whereas, by Section 321, Part II, Title III of the Transportation Act of 1940, approved September 18, 1940, (Public No. 785, 76th Cong., 3d Session) land-grant deductions with regard to the transportation of Government property were abolished except with regard to the transportation of military or naval property of the United States moving for military or naval and not for civil use,

(Defendant's Exhibit B Identification)

and to the transportation of members of the military or naval forces of the United States (or property of such members) when such members are traveling on official duty;

Whereas, prior to the entry of the United States into the present war on December 8, 1941, there was no basis for a determination by the Commission as of the time of transportation of any such materials, equipment and supplies that upon completion any particular vessel or group of vessels would be devoted primarily to the purposes of war rather than to the purposes of commerce; and

Whereas, subsequent to said date of December 8, 1941, it became apparent that all merchant vessels then in the process of construction and thereafter to be constructed until the termination of the present war were to be devoted primarily to the purposes of war, rather than to the purposes of commerce, for the transportation of munitions and supplies for direct consumption by military and naval forces in the various theatres of war, and for the transportation of military and naval personnel to and from said theatres of war.

Now, Therefore, Be It Resolved That:

1. The Commission hereby finds and determines that, as of December 8, 1941, all vessels then in the process of construction and thereafter to be constructed were to be devoted primarily to the purposes of war rather than to the purposes of commerce, and that all materials, equipment and supplies purchased by the Commission, its agents

(Defendant's Exhibit B Identification)

and contractors for incorporation in the construction of such vessels were, upon passage of title to the Government after said date of December 8, 1941, military or naval property of the United States and upon shipment moved for military or naval and not for civil use;

2. The proper officers of the Commission be authorized and directed to take any and all actions necessary and proper to obtain the benefit of land-grant freight rates wherever applicable in accordance with the provisions of Part II, Title III, Section 321 of the Transportation Act of 1940, on the basis of the action of the commission as herein set forth.

Case No. 4256. Pacific Electric vs. U. S. Deft's Exhibit. Date 10/30/46. No. B Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

Mr. Margolies: We have likewise a resolution adopted by the United States Maritime Commission on July 2, 1946, with which plaintiff's counsel is familiar; and I take it [14] that after inspecting it, your Honor will wish to make the same ruling.

Mr. Yeomans: I would make the same offer as to its foundation and the same objection as to its admissibility.

The Court: Very well. Let it be marked Defendant's Exhibit C for identification at this time, and the court will reserve ruling upon its admissibility.

[DEFENDANT'S EXHIBIT C IDENTIFICATION]

RESOLUTION ADOPTED BY U. S. MARITIME
COMMISSION ON JULY 2, 1946

Whereas, on December 4, 1942, the Commission adopted a resolution determining that, as of December 8, 1941, all vessels then in the process of construction or thereafter to be constructed were to be devoted primarily to the purposes of war rather than to the purposes of commerce, and that all materials, equipment and supplies purchased by the Commission, its agents and contractors, for incorporation in the construction of such vessels were, upon passage of title to the Government after December 8, 1941, military or naval property of the United States, etc.; and directing its officers to take all action necessary and proper to obtain the benefit of land grant freight rates in accordance with Part II, Title III, Section 321, of the Transportation Act of 1940; and

Whereas, upon the surrender of Japan on September 1, 1945, the Commission's shipbuilding program ceased to have a military purpose as its main objective;

Now, Therefore, Be It Resolved That:

1. The Commission hereby determines that the circumstances set forth in its aforesaid Resolution of December 4, 1942, are no longer in effect;

2. After September 1, 1945, the date of the formal surrender of Japan, the primary purpose of the ship construction program of the Commission ceased to be military;

3. Property purchased by the Maritime Commission when shipped after September 1, 1945, should not be re-

(Defendant's Exhibit C Identification)

garded as military or naval property of the United States moving for military use, within the meaning of Part II, Title III, Section 321 of the Transportation Act of 1940.

4. The Commission will not claim land grant rates on the movement of any of its property shipped after September 1, 1945.

Case No. 4256 WM-Civ. Pacific Electric vs. U. S. Deft's Exhibit. Date 10/30/46. No. C Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

Mr. Margolies: We would like to point out that, as the agency in interest, it was incumbent upon the Maritime Commission to classify materials and to specify on the bills of lading on which the shipments moved whether they were military or naval property; so that this was not anything done outside the course of business, but it fell within the line of duty of the Maritime Commission in having transported for its use the property which I have stated over the railroads of the country.

Mr. Yeomans: I would like to wait and present whatever argument we have on that question as a part of our argument.

The Court: Is there any contention that these resolutions were brought home to the plaintiff here; that the plaintiff had knowledge of them before the shipments?

Mr. Margolies: May I say that they are published rulings of the General Accounting Office, and in August of 1941 the Maritime Commission had requested a ruling of the General Accounting Office as to whether property shipped [15] under its programs were military and naval property of the United States.

There is a published opinion of the General Accounting Office stating that in August of 1941, that that was a matter to be decided by the Maritime Commission in the administration of its various programs.

That undoubtedly was brought home to the carriers, who were extremely sensitive to rulings of the General Accounting Office as to transportation matters.

The Court: Does the defendant contend here that the plaintiff had notice of these resolutions prior to undertaking the shipments that are involved here in this case; and if so, how is that notice brought home? Is there any basis upon which legally to charge the plaintiff with knowledge of the contents of these resolutions?

Mr. Margolies: As we see it, it is not so much a matter of whether they were on notice, but as to whether this was not administrative action taken—

The Court: Yes; I appreciate that. I just wondered if the Government was making the other contention, that the defendant knew or was legally charged with knowledge of the action taken prior to accepting the shipments, laying aside for the moment your contention that this represents an administrative interpretation and an administrative action in the course of duty charged by law. [16]

Mr. Margolies: The General Accounting Office ruling is in Volume 20 of Opinions of the General Accounting Office, that the carriers knew that the Maritime Commission shipments were going to move at what the Government contended were land grant rates.

The Court: Were these rulings published in Federal Register?

Mr. Yeomans: I might say that if counsel is agreeable, I have a copy of the Comptroller General's opinion—it has been referred to—which I would like to offer the

court for the court's information in connection with this. It is an opinion by the Comptroller General on this very issue we have in this case and, although we do not agree with it, the court might be interested in reading it.

The Court: Yes; I would be glad to have you.

Mr. Yeomans: It is a copy, but I think it is sufficient. It is quite lengthy.

The Court: That is Opinion No. B-19374, published in 21 Comptroller General's Opinions 137, opinion dated August 15, 1941. Is there any objection to marking this as a plaintiff's exhibit?

Mr. Yeomans: I do not offer it as an exhibit in evidence. It is merely an opinion, just like a published opinion of the Comptroller General.

The Court: The only thought I had, it might be well [17] to have it with the record. It might be convenient not only to this court but some other court.

Mr. Yeomans: It is perfectly all right to mark it, as long as it is understood it is not offered by the plaintiff as anything in support of its case.

The Court: Well, we will mark it as a defendant's exhibit.

Mr. Margolies: Suppose we mark it, as an agent of the court, by virtue of its having been printed in Volume 13-C-27. There is no reason why either side should be saddled with the cost.

The Court: Very well; I will just retain it, then, without marking it, just as I would any opinion of any court.

Mr. Yeomans: It is a duly published opinion.

Mr. Galland: Your Honor, I think I might be able to supply one scrap of information that will clear up your last question as to whether the carrier had notice of this resolution prior to the acceptance of these shipments. It

had not and could not, because, as I recall, all of these shipments were made before this resolution was passed; and it was for that reason that I mentioned, a short while ago, that I thought we should have it understood that it was passed on December 4, 1942, rather than as "of"; because, by its own terms, it purports to have been a determination [18] as of an earlier date, namely, the day after Pearl Harbor and it was actually passed subsequent to the transportation.

Mr. Yeomans: Some of it went before and some after.

Mr. Galland: Most of it went before, I think.

Mr. Yeomans: Yes, sir.

Mr. Galland: There may have been several that went after, but it was certainly after some of them.

Mr. Margolies: There were shipments in 1943.

Mr. Yeomans: That is right; some before and some after.

The Court: Let me ask you: Is there any provision in law that charges anyone with notice of the Comptroller General's opinions?

Mr. Margolies: I would think that there is not.

The Court: Is there anything in the Statute that charges anyone with notice of the resolutions and actions of the Maritime Commission?

Mr. Margolies: On the notice problem, I do not believe that anybody is chargeable with any published resolution of the Maritime Commission.

The Court: The resolutions are not as a matter of course published in the Federal Register?

Mr. Margolies: They are not to the extent that they do not affect the public. Insofar as they are required by the Federal Register Act to be published because they affect the public, the public would be charged with notice [19] by virtue of the Federal Register Act.

It is not our contention that the carriers are chargeable with notice.

The Court: Of Defendant's Exhibits B and C for identification?

Mr. Margolies: Of Defendant's Exhibits B and C for identification. Our reliance on them relates to the usual presumption, that executive officers of the Federal Government charged with administering an act and charged with carrying on the Government's business have presumptive validity attached to their acts under—

The Court: I understand that point. I just wanted to be sure that I understood the full contention with respect to the effect of resolutions, exhibits B and C for identification.

Now you have stated to me that there is no contention by the defendant that the plaintiff had knowledge or was charged with knowledge of the existence of the resolutions.

Mr. Margolies: May I add, that in entering into this stipulation it was the opinion of the defendant, joined in, I believe, by plaintiff, that the question for decision by this court was whether the property was military or naval property of the United States, moving for military or naval purposes; and defendant does not contend that by carrying this property at all plaintiff waived its right to [20] those issues.

The Court: Very well. Is there any further evidence which the defendant cares to offer?

Mr. Margolies: We have no further.

The Court: The plaintiff?

Mr. Yeomans: No further evidence.

The Court: Both sides rest?

Mr. Yeomans: We rest as far as plaintiff is concerned.

The Court: All right, Mr. Yeomans.

Mr. Yeomans: Before starting on my actual argument, I do have written a very rough reply to defendant's brief. I thought it might serve some purpose to at least have our views in writing, as well as to present them orally on the briefs. I am doing this and apologizing somewhat for the form it is in, but possibly it will serve some purpose.

The Court: Yes; I will be glad to have the benefit of it.

Mr. Yeomans: I would like to give the court two copies of this.

And also, I noticed after the filing of our original briefs that there were a number of errors in the printed brief; and I have had a copy corrected and I would like to give this to the court possibly to substitute for the one that was filed that has a number of printer's errors. Most of them are obvious but a few of them might not be. [21]

The Court: Very well. Is there any objection to withdrawing the original on file and substituting the corrected copy?

Mr. Yeomans: They are very minor changes, but I think counsel has seen a copy of the ones with the changes made.

Mr. Margolies: On the assurance by plaintiff's counsel that they conform to the changes we have seen, we have no objection.

Mr. Yeomans: It is exactly the same, and the changes are even made in pen so it is obvious the changes that are made.

The Court: Very well. The clerk may withdraw the original now on file and substitute a corrected copy in place thereof. Do you have an extra one for the court's use?

Mr. Yeomans: Yes. Excuse me.

The Court: Mr. Yeomans, I will return to you the court's copy of the brief that has been filed, if you like.

Mr. Yeomans: Thank you.

As a basis of starting off this argument, I think it would be well to go through the stipulation that we have entered into, to have in mind exactly what our factual case is that we are going to argue about. And the way that seemed it could best be presented would be to briefly outline [22] the problem that we had in entering into the stipulation, and what we actually stipulated to, and what we were not able to stipulate to.

The Court: May I interrupt you, Mr. Yeomans, at this point? There are a number of remaining cases. All the cases on file involving these land transportation rates between these parties have been assigned to me, and the thought occurred to me it might be possible to enter into some stipulation with respect to the disposition of those cases.

Are the other cases to abide the event of the decision in this case, or is that practicable?

Mr. Yeomans: Our conclusion in that respect was that undoubtedly the decision in this case will control most of those cases. We were not in a position where we wanted to enter into a stipulation that they would control, because there are some differences. * * *

(Argument omitted from transcript at request of counsel.)

The Court: If there is nothing further, I will submit the matter on the briefs and on the file, and will let you have my decision at the soonest date convenient.

[PLAINTIFF'S EXHIBIT NO. 1]

MCc-ESP-10

MCc-7785

CONTRACT FOR THE
CONSTRUCTION OF EMERGENCY CARGO SHIPS

This contract entered into as of this 14th day of March, 1941, between the United States Maritime Commission (herein called the "Commission") and California Shipbuilding Corporation, a corporation organized and existing under the laws of the State of Delaware (herein called the "Contractor").

Whereas:

1. Pursuant to the provisions of an Act approved February 6, 1941 (Public No. 5, 77th Congress), the Commission is authorized to construct in the United States ocean-going cargo vessels of such type, size and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States, and to be capable of the most rapid construction;

2. The Commission has determined to have certain vessels hereinafter described constructed for the aforementioned purpose pursuant to the provisions of the aforesaid Act;

3. Under date of January 11, 1941, the Contractor and the Commission entered into a contract (herein called the "Facilities Contract") whereunder the Contractor agreed to construct for the Commission on land leased or owned by the Contractor such shipyard facilities as are provided for in said Facilities Contract; and

(Plaintiff's Exhibit No. 1)

4. The Contractor is willing to construct the vessels hereinafter described at the site of said shipyard facilities in consideration of a reimbursement to it of the costs of such construction work and the payment by the Commission of a fee upon the terms and conditions hereinafter specified.

Now, therefore, in consideration of the premises and mutual covenants, agreements, and conditions hereinafter set forth, the parties hereto agree as follows:

ARTICLE 1.

The term "Vessel" shall be deemed to include the hulls of the vessels, whether completed or uncompleted, to be constructed by the Contractor pursuant to the terms of this contract, and also all materials, vessel items and appurtenances, vessel machinery and vessel equipment used or to be used in the construction or equipment thereof.

The term "Facilities" shall be deemed to include the shipyard and facilities and all machinery, materials, items, equipment and appurtenances used or to be used in the construction or equipment thereof, but not the land on which said shipyard and facilities shall be constructed.

The Commission, in entering into this contract, is acting as the representative of the United States of America and wherever reference is made in this contract to property or facilities of, or owned by, the Commission, such reference shall include property or facilities owned by the United States of America furnished under the Facilities Contract.

(Plaintiff's Exhibit No. 1)

ARTICLE 2.

(a) The Contractor, acting as an independent contractor, and not as agent, shall construct, launch, equip and complete ready for service, and deliver to the Commission thirty-one steel hulled, steam-propulsive powered, cargo-carrying vessels (herein called the "Vessels") equipped and constructed with their machinery, materials, items, equipment and appurtenances. The Contractor shall perform its obligations as set forth above at Los Angeles, California, on the site of the Facilities described in the Facilities Contract, in accordance with the terms of this contract and the plans and specifications (herein called the "Plans and Specifications") which have, at or before the execution of this contract, been approved by the Commission and identified by the signatures of the parties hereto, and which are hereby made a part hereof with the same force and effect as though herein set out in full. The Contractor shall furnish all labor, materials, supplies and equipment (except materials, supplies and equipment to be furnished by the Commission) required to perform its obligations as set forth above.

(b) All general language or requirements contained in the Plans and Specifications are intended to amplify, explain and implement the requirements of this contract, but any such general language or requirements inconsistent with the provisions hereof are superseded by this contract. The Plans and Specifications are also intended to explain each other and anything shown upon the Plans and not stipulated in the Specifications, or stipulated in the Specifications and not shown upon the Plans, shall be deemed and considered as if included in both.

(Plaintiff's Exhibit No. 1)

(c) Until the last of the Vessels shall have been completed, unless this Contract shall be terminated at an earlier date, as hereinafter provided, the Contractor, without payment of rent therefor, shall have exclusive use and possession of the Facilities owned by the Commission for the sole purpose of constructing the Vessels upon the terms and conditions hereinafter set forth.

(d) The Contractor at the expense of the Commission shall maintain and keep the Facilities and premises on which such Facilities are constructed, and all appurtenances and equipment thereof, in good order and condition for the work to be performed hereunder.

(e) The Contractor shall police the Facilities and shall use reasonable diligence to exclude all unauthorized persons therefrom and to prevent loss or injury to the Facilities or the Vessels.

(f) The Contractor shall promptly pay any rental due under any lease made by the Contractor for the premises on which the Facilities are located, or any part thereof, and shall duly and faithfully perform each and every of its obligations, undertakings, and covenants under such lease or leases. In the event that the premises on which the Facilities are located, or any part thereof, shall be owned by the Contractor, the Contractor shall pay promptly all taxes, assessments and other charges levied or assessed thereon and shall not create or permit to be created any right, including mortgages, liens, or other incumbrances, by which any person shall have any claim or interest in

(Plaintiff's Exhibit No. 1)

or to any improvement, building, structure, or equipment erected or constructed on said premises pursuant to the Facilities Contract, even though the same shall have been attached thereto and become part thereof.

(g) Without the prior written consent of the Commission, the Contractor shall not use the Facilities or any of the buildings, appurtenances, or equipment located on the premises described in the Facilities Contract for any purpose other than that of constructing the Vessels, and the authorized representatives of the Commission shall have access to the Facilities at all times for the purpose of determining whether the Contractor is complying with the requirements of this contract and the Facilities Contract.

ARTICLE 3.

The Commission reserves (without limitation thereof) the right to correct any errors or omissions in, and to make any changes in, deductions from, or additions to, the Plans and Specifications. However, changes shall not be made in the general dimensions and characteristics of any of the Vessels unless such changes are made with the written consent of the Contractor.

The Contractor shall not depart from the requirements of the Plans and Specifications unless such departure is approved in writing by the Commission. No changes of any nature affecting the construction, equipping and completion of any of the Vessels are to be started or made by the Contractor before such changes have been duly authorized in writing by the Commission.

(Plaintiff's Exhibit No. 1)

ARTICLE 4.

Certain of the materials, equipment, and machinery to be used in the construction of the Vessels will be furnished to the Contractor by the Commission. A list of such materials, equipment, and machinery is attached hereto and marked "Exhibit A," and the Contractor shall not, without the prior written consent of the Commission, purchase or agree to purchase for use in connection with the performance of the work hereunder any of the items listed on said "Exhibit A." The Contractor, at the expense of the Commission, shall adequately store and care for all such materials, equipment and machinery delivered to the site of the Facilities until they shall be incorporated in the Vessels and shall pay all transportation charges thereon which are payable upon delivery.

At any time during the course of the performance of the work hereunder, the Commission may amend said "Exhibit A" so as to add to the list of items therein contained. Within ten days from the date of receipt of a notice of such amendment, the Contractor shall notify the Commission of any items included in such amendment which the Contractor has purchased or agreed to purchase with the approval of the Commission prior to the receipt of notice of the amendment, and such amendment shall be ineffectual as to any such items. The Contractor shall thereafter follow the instructions of the Commission with respect to such items as may be effectively added to said Exhibit by such amendment, but the Contractor shall be reimbursed for any costs incurred by it in following such instructions.

Set forth opposite each item of material, equipment and machinery on "Exhibit A" is a list of dates furnished by

(Plaintiff's Exhibit No. 1)

the Contractor, on or before which the quantities of material and equipment and the items of machinery indicated shall be delivered by the Commission to the site of the Facilities to enable the Contractor to deliver the Vessels in accordance with the schedule of Vessel deliveries contained in Article 5 hereof. On any amendments to Exhibit A the Contractor shall furnish to the Commission the dates on which the additional material covered thereby shall be required in order to enable it to meet said schedule of Vessel deliveries.

ARTICLE 5.

The Contractor shall deliver each of the Vessels to the Commission after such Vessel has been completed ready for service, and has passed the tests as prescribed in the Specifications. Such delivery shall be made at or near the shipyard referred to in Article 2 (a) hereof, at a place alongside of a safe and accessible pier at that place, where there must be sufficient water for the Vessel always to be afloat, custom to the contrary notwithstanding, free and clear of all liens and claims of every nature, or at such other place as may be mutually agreed upon.

Unless prevented by any of the causes enumerated in Article 6 hereof, the work under this contract shall be commenced on or before March 18, 1941 and shall be prosecuted with diligence and the time thereafter within which each of the Vessels is to be delivered to the Commission, unless such time is extended by conditions of "force majeure" as defined in Article 6 hereof, or under any of the other provisions hereof, is to be in accordance with the following schedule:

(Plaintiff's Exhibit No. 1)

Delivery Schedule in Number of Days
After March 18, 1941.

<u>Builder's and M. C. Hull Nos.</u>	<u>Number of Calendar Days*</u>
64	320
65	332
66	344
67	356
68	368
69	380
70	392
71	404
72	420
73	433
74	446
75	458
76	469
77	479
78	492
79	502
80	542
81	554
82	567
83	579
84	590
85	600
86	610
87	622

(Plaintiff's Exhibit No. 1)

<u>Builder's and M. C. Hull Nos.</u>	<u>Number of Calendar Days*</u>
88	650
89	667
90	681
91	693
92	704
93	718
94	731

*Scheduled delivery dates to be computed on basis of calendar days elapsing from March 18, 1941, such date not to be included in computation but day of scheduled delivery to be included therein.

Provided that the Commission in its sole discretion may for any reason extend the time for delivery of the first three Vessels to be constructed hereunder and also in its sole discretion may extend the time for the delivery of the balance of the Vessels or any thereof to the extent that in its judgment said Vessels will be delayed by reason of the delay in the delivery of the said first three (3) Vessels.

It is mutually agreed by and between the parties hereto that time is of the essence of this contract, and that all actions taken by the parties hereto and their agents shall be taken to the end that the performance of this contract will be fully expedited.

The Contractor may in his discretion operate the shipyard and all facilities used in the construction of the Vessels and may carry on the work of constructing the Vessels six (6) days per week (legal holidays excepted)

(Plaintiff's Exhibit No. 1)

and such number of shifts per day as may be determined by the Contractor.

Subject to any applicable law or regulation of any agency of government made pursuant to any such law the base rates of wages paid to employees of the Contractor employed in the performance of this contract shall not be higher than the rate of wages prevailing in shipyards in the municipality or other civil subdivision of the State in which the Facilities are located, or if there shall be no other shipyards in such civil subdivision then in the locality in which the Facilities are located, unless the Commission shall approve the payment of other rates. The Contractor shall submit to the Commission for its approval a statement of the rates to be paid to mechanics, helpers and laborers. No increases in the wage scale established by the Contractor at the beginning of work under the contract shall be made without the written approval of the Commission.

ARTICLE 6.

The term "force majeure" as employed herein shall be deemed to mean all causes whatsoever (except inclement weather of the ordinary seasonable nature) not reasonably within the control of the Contractor among which, but not exclusive of other causes, are acts of God; war between the United States and any foreign country; civil war, riot or insurrection in the United States; requirement of, intervention by or delays caused by civil, naval or military authorities or other agencies of government; arrests and restraints of rulers and people; priorities; blockades; embargoes; vandalism; sabotage; epidemics; strikes, lockouts or other industrial disturbances; earth-

(Plaintiff's Exhibit No. 1)

quakes; landslides; floods, hurricanes and cyclonic storms; damage by lightning; explosions; collisions; strandings; fires; inability of the Contractor to obtain sufficient and adequate labor at wage rates approved by the Commission; shortage of materials and equipment, provided that the Contractor has ordered all necessary materials and equipment at the proper times and used reasonable effort to obtain delivery of such materials and equipment at the time and in the order required to carry on the work properly; delays of carriers by land, sea or air or delays of subcontractors, or delays in the completion of the Facilities for any causes beyond the control of the Contractor including any of those enumerated in this paragraph which delay the starting of or orderly prosecution of the Vessel construction work; or delays due to any failure on the part of the Commission to perform its obligations hereunder, including, but not limited to, failure to act within a reasonable time on subcontracts or plans and specifications prepared by the Contractor and submitted for Commission's approval or failure to furnish the working plans for the Vessels referred to in Article 12 hereof as required by the Contractor, or failure to cause the material listed in "Exhibit A" and any amendments thereof to be delivered at the site of the Facilities on the dates shown in said "Exhibit A" or amendments thereof; or delays due to changes ordered by the Commission in any plans or specifications including any delay resulting from changes in the Facilities referred to in the Facilities Contract made necessary by such changes.

Written notice of any delay caused by "force majeure" and the anticipated result thereof shall, when knowledge thereof has come to the Contractor, be given promptly by

(Plaintiff's Exhibit No. 1)

the Contractor to the Commission. Within twenty (20) days after such cause of delay has ceased to exist, the Contractor shall file with the Commission a statement of the actual delay resulting from such cause. Provided such notices shall have been given the time for delivery of the Vessel or Vessels, or any following Vessel or Vessels affected by such "force majeure," shall be extended for such time as the Contractor shall have been actually delayed in the completion of such Vessel or Vessels by reason of such "force majeure." In the event that the parties are unable to agree that the cause of delay is "force majeure" or as to the extent of the resulting delay, the matter shall be referred to arbitration as hereinafter provided. The duty of submitting and going forward with the evidence before the Arbitrators shall be on the Contractor.

ARTICLE 7.

The Commission will pay or cause to be paid to the Contractor the entire cost to the Contractor of performing this contract plus a fee for which provision is hereafter made; Provided, That in no event shall the amount payable under this contract (including payments to be made by the Commission under the succeeding Articles hereof) exceed \$30,000,000, unless the Commission shall determine that the cost of performing this contract plus the fees to be paid to the Contractor hereunder will be in excess of such amount and agree by notice in writing to the Contractor to pay such increased cost plus all fees as calculated upon the basis herein set forth; and provided further, that the Contractor shall not be deemed to have guaranteed that this contract can be performed and any fees paid for said amount and shall in no event be obligated to

(Plaintiff's Exhibit No. 1)

continue its performance of this contract beyond a point at which its obligations under any leases of the premises on which the Facilities provided for in the Facilities Contract shall be constructed and under any contracts for services, labor, material and supplies required for the performance of this contract plus fees payable to the Contractor earned or accrued under the provisions of this contract shall equal the unexpended portion of the amount payable by the Commission hereunder.

A. Such cost shall be determined in accordance with the rules and regulations for determining costs issued by the Commission and entitled "Regulations Prescribing the Method of Determining Profit, Adopted May 4, 1939," as amended, in so far as applicable, and (in so far as the same are not applicable) in accordance with sound accounting practice. There shall be included (but without limitation), in determining such cost, the following items:

1. The actual net cost to the Contractor (after deducting all discounts, refunds, allowances, and price adjustments which have accrued to the benefit of the Contractor) of all materials, equipment, and machinery purchased by the Contractor for the construction of the Vessels or for the maintenance or operation of the Facilities and the premises on which they are constructed during the course of the construction of the Vessels.

2. The actual cost of all labor properly chargeable to the construction and protection of the Vessels, the processing of materials for the construction thereof, and the maintenance, operation and protection of the Facilities and the premises on which they are constructed, including piece work and incentive bonuses, bonuses to shift

(Plaintiff's Exhibit No. 1)

workers, overtime pay, pay for lunch periods and for vacations if actually paid by the Contractor.

3. The salaries and wages of officers, managers, superintendents, foremen, engineers, draftsmen, supervisors, storekeepers, clerks, and laborers and all other employees on the pay roll of the Contractor who are engaged in the maintenance, construction or protection of the Vessels or in the maintenance, operation and protection of the Facilities and the premises on which they are constructed, or in clerical or administrative work in connection with any of such activities.

4. The actual net cost to the Contractor of engineering services, plans and specifications, bills of material, estimates, etc., purchased by the Contractor and reasonable legal and accounting fees specifically approved by the Commission, and charges for clerical and administrative services rendered by others (including affiliates) provided that the incurring of such charges and the rates therefor shall have been approved by the Commission.

5. The actual cost of delivery of the Vessels and of any trials or tests which the Contractor may be required to perform prior to the acceptance of the Vessels.

6. Rental and other payments made by the Contractor during the period of construction of the Vessels, pursuant to the provisions of any lease approved by the Commission under the Facilities Contract.

7. Reasonable rentals or service charges for equipment, including such equipment owned by the Contractor for periods required, the equipment to be in good working order before rental periods begin. The rental or service charge for a particular piece of equipment shall not exceed

(Plaintiff's Exhibit No. 1)

the replacement value (at the beginning of the rental period) of such equipment. Whenever the aggregate rental paid for any item of equipment equals the replacement value (at the beginning of the rental period) of such item of equipment, such equipment shall become the property of the Commission.

8. The actual net cost of fuel, power, water, stationery, telephone, telegraph, reasonable traveling and transportation expense of employees, freight, express, trucking, unloading and handling costs, permits, licenses, royalties for the use of patents when authorized by the Commission or required by the design of the Vessel, Federal and State Social Security, Unemployment Compensation and other similar taxes and charges, excise and other taxes as defined in paragraph 748 of said Regulation, premiums for Workmen's Compensation, public liability, fire and other insurance and bonds to the extent herein provided, and the actual net cost of reconstructing or replacing any work or Facilities destroyed or damaged and not covered by insurance.

9. Actual interest paid or accrued for payment (not in excess of rates approved by the Commission) on loans from others, including affiliates, stockholders, or the parent corporation of the Contractor (subject to the provisions of Article 22 hereof), incurred solely for the purpose of performing this contract and for the period of the construction of the Vessels and for such further periods as the Commission shall approve.

10. The actual net cost of supplies, tools and equipment purchased by the Contractor and used in the construction of the Vessels or for the repair, maintenance

(Plaintiff's Exhibit No. 1)

and operation of tools and equipment during the course of construction of the Vessels and until final acceptance thereof.

11. General, administrative and operating expenses of the Contractor incurred in the performance of this Contract, not otherwise provided for herein, to the extent approved by the Commission.

12. The actual net cost to the Contractor of carrying on a training program reasonable in extent for the training of employees for the shipbuilding project, including (but not limited to) salaries of instructors, rental of training quarters, if required, cost of supplies, materials, equipment and wages to trainees.

13. State, City, and County taxes assessed against the land and improvements upon which the Vessels or any part or parts thereof are being constructed and referable to the period of construction and paid by the Contractor.

14. All proper cancellation costs and charges incurred by the Contractor when cancellations or terminations are directed and approved by the Commission.

15. The Contractor shall be reimbursed for all costs of remedying defective work or replacing materials as required of it by the provisions of Article 12 hereof, or elsewhere under this contract, whether the material or work shall have been furnished or supplied by the Commission or the Contractor.

B. Unless otherwise specifically provided herein, in determining cost reimbursable hereunder, there shall be excluded from such cost (i) the exclusions required by the Regulations above referred to including without limitation those set forth in paragraph 7.23 of said Regulations.

(Plaintiff's Exhibit No. 1)

provided that any expense approved by the Commission prior to the time it is incurred shall not be deemed to be excessive or unreasonable in the absence of fraud or misrepresentation of the Contractor or its employees, or unless such expenses are for materials or equipment which are used for purposes other than performing work under this contract; (ii) depreciation on the Facilities; (iii) salaries or wages, in any form, knowingly paid in violation of Section 1 of Public No. 5 (77th Congress) approved February 6, 1941; and (iv) disbursements made without prior authorization of the Commission for extension or enlargement of the Facilities as described in the Facilities Contract.

C. All excess materials, tools and equipment and other items purchased by the Contractor and for which it has been reimbursed, including scrap, shall remain the property of the Commission and shall be retained and delivered to the Commission or sold for the Commission's account in such manner and at such times as the Commission may direct or approve.

ARTICLE 8.

In addition to reimbursing the Contractor for all its costs as provided in Article 7 hereof, the Commission shall pay the Contractor for its services a base fee in the sum of \$110,000 for each Vessel completed, delivered and accepted in accordance with the provisions of this contract. This base fee shall be increased or decreased as determined in the following subarticles, A and B to wit:

(A) If delivery of any Vessel is delayed beyond the delivery date stipulated therefor in Article 5 hereof, then

(Plaintiff's Exhibit No. 1)

the base fee payable to the Contractor under the provisions hereof with respect to said Vessel shall be decreased to cover fixed, agreed and liquidated damages (and not as a penalty) for delay in delivery of each such Vessel an amount equal to \$400 for each and every calendar day of such delay; provided that in the event the delivery date for any such Vessel shall be extended under any provision of this contract, the date for reckoning such liquidated damages shall be correspondingly extended. The exaction of such liquidated damages shall not affect any other rights or remedies of the Commission upon default by the Contractor under any other provision of this contract. If any Vessel is completed and ready for tender of delivery to the Commission prior to the delivery date stipulated therefor in Article 5 hereof, or prior to any delivery date that may exist under any extension of time pursuant to any provision hereof, then the base fee payable to the Contractor under the provisions hereof with respect to said Vessel shall be increased by an amount equal to \$400 for each and every calendar day elapsing between the date on which such Vessel is actually completed and ready for such tender of delivery and said delivery date.

(B) It is agreed that the estimated average number of man hours of direct and indirect labor required to complete the work to be performed hereunder by the Contractor on each of the Vessels (hereinafter called the "Estimated Average Vessel Hours") is 648,432, (exclusive joiner work) subject to the following adjustments for each such Vessel:

(1) For authorized changes in the Plans and Specifications affecting any such Vessel, an equitable adjustment in the Estimated Average Vessel Hours

(Plaintiff's Exhibit No. 1)

for such Vessel shall be made pursuant to agreement between the parties hereto.

(2) Within ten days after the execution hereof the Contractor has filed with the Commission and the Commission has accepted as the basis for the Estimated Average Vessel Hours as hereinafter set forth a statement of the extent to which it is contemplated the performance hereof will be through outside subcontractors. If any change shall be made in the amount of work so to be performed by subcontractors as so stated, an equitable adjustment shall, pursuant to agreement between the parties hereto, be made in the Estimated Average Vessel Hours for each Vessel affected by such change.

(3) For each day by which the delivery time of any Vessel shall be extended under any of the provisions of this contract, the Estimated Average Vessel Hours for such Vessel shall be increased by an equitable adjustment pursuant to agreement between the parties hereto.

If the actual average number of man hours of direct and indirect labor expended by employees of the Contractor in the completion of any Vessel (hereinafter called the "Actual Average Vessel Hours") shall be less than the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid, then the fee payable with respect to such Vessel shall be increased by an amount equal to 50¢ multiplied by the difference between the Actual Average Vessel Hours and the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid; but if the Actual Average Vessel Hours shall be greater than the Esti-

(Plaintiff's Exhibit No. 1)

mated Average Vessel Hours for such Vessel, adjusted as aforesaid, then the fee payable with respect to such Vessel shall be decreased by an amount equal to $33\frac{1}{3}\%$ multiplied by the difference between the Actual Average Vessel Hours and the Estimated Average Vessel Hours for such Vessel, as so adjusted.

The total actual number of man hours of direct and indirect labor expended by employees of the Contractor in the completion of all the Vessels constructed hereunder shall be determined upon the completion of the construction of all such Vessels and such total actual number of man hours shall be divided by the number of Vessels so constructed in order to determine the Actual Average Vessel Hours for the purposes of this subarticle (B).

The term "man hours of direct and indirect labor" as used herein shall mean the actual hours worked by all employees of the Contractor except the Contractor's corporate officers, its auditor, general manager, general superintendent, superintendents and general foreman, provided, that with respect to employees compensated upon a weekly or other salary basis other than those above excluded the number of hours deemed to be "actual hours worked" shall be at the rate of forty-eight hours for each week so compensated.

The Commission may substitute for the above set forth method of determining adjustments under this subarticle (B) any other method satisfactory to the Contractor should it at any time, in the judgment of the Commission, appear that the results of the methods prescribed in this subarticle (B) do not reflect equitably the amount to be added to or deducted from the base fee by reason of increased or decreased man hours.

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The net adjusted fee as calculated under the provisions of this Article shall be subject to deductions on account of expenditures made by the Contractor which shall not be reimbursable to the Contractor as provided in Article 7 hereof, which have been reimbursed to the Contractor and which it has retained, but it is specifically covenanted and agreed that in no event shall the net fee to be paid to the Contractor for each Vessel be less than \$60,000, or more than \$140,000, after the application of all adjustments, additions, deductions, penalties, damages, credits and liabilities of whatever kind, it being further covenanted and agreed that in addition to the net fee per Vessel as herein determined the Commission shall pay the Contractor the full cost of its performance of this contract, with no exclusions or deductions from such cost other than those provided for under the provisions of paragraph B of Article 7 hereof.

ARTICLE 9.

(a) The Contractor agrees to keep records and books of account on a recognized cost accounting basis satisfactory to the Commission and in conformance with a condensed chart of accounts which the Commission will furnish, showing the actual cost to it of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. Statements and returns relative to expenditures shall be made as and when directed by the Commission.

(b) The Commission and its authorized representatives shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the

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premises, work and materials, to all books, records, correspondence, instruction, plans, drawings, receipts, vouchers and memoranda of every description of the Contractor pertaining to said work and all such books, records and other papers shall be the property of the Commission and shall be surrendered by the Contractor upon the completion of this contract and upon delivery to the Contractor of a release by the Commission, but the Contractor shall have the right to make and may retain copies thereof. Upon the completion of this contract the Commission will give the Contractor duly authenticated copies of such books, records and other papers herein mentioned, or in lieu thereof, will at all times thereafter afford the Contractor proper facilities for inspection of the same.

(c) Any duly authorized representative of the Contractor shall be accorded the privilege of examining and making copies of the books, records and papers furnished by him to the Commission. All information obtained by the Commission from the Contractor's accounts and records shall be treated as confidential.

ARTICLE 10.

The Commission will make semi-monthly payments as soon as practicable after receipt of certified public voucher covering costs reimbursable to the Contractor under this contract, which have been paid by the Contractor prior to the submission of such voucher, and evidence satisfactory to the Commission of the payment by the Contractor of such costs, provided that payments shall be made more frequently and at any time upon submission by the Contractor of certified public voucher (not made the basis of prior payment), with evidence of payment, in an amount

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in excess of \$100,000. Any such voucher or part thereof supported by the required evidence shall be paid in any event within 10 calendar days after receipt thereof by the Commission in Washington, D. C.

ARTICLE 11.

Within 15 days after the launching of each Vessel and receipt of public voucher the Commission will pay to the Contractor the sum of \$30,000 on account of the fee payable in respect to such Vessel provided for in Article 8 hereof. Within 15 days after the delivery of each Vessel and receipt of public voucher the Commission will make to the Contractor a further payment in the amount of \$30,000 on account of such fee. Upon full accounting, which shall be made in any event within six months after the delivery of the last Vessel, the Commission shall pay to the Contractor all balances due it under this contract.

ARTICLE 12.

(a) All material and workmanship furnished by the Contractor, unless otherwise provided in the Specifications, shall be subject to inspection by inspectors of the Commission at any and all proper times during manufacture or construction at any and all places where such manufacture or construction shall be carried on.

(b) The Contractor shall at the expense of the Commission furnish promptly all reasonable facilities and materials, necessary for the Commission's representatives (including inspectors and auditors), including suitably furnished offices with light, heat, telephone, desks, drawing tables, and filing cabinets.

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(c) The Commission will employ an architect to prepare a full set of See Bee tracings of working plans and bills of material required for the construction of the Vessels and the Commission will furnish the same to the Contractor in accordance with a schedule of dates which will be agreed upon by the Contractor and the Commission within two weeks after the signing hereof. If any changes are made in such plans during the course of construction of the Vessels, the Contractor shall promptly furnish the Commission with new tracings showing such changes.

(d) Any working plans not supplied by the Commission shall, as they are prepared during the progress of the work, be submitted (in such numbers as may be required) to the Commission's representative at the plant, and action thereon by the Commission shall be taken as promptly as possible and in any event within seven days after submission of any such plan.

(e) The Commission shall promptly pass all work and material conforming to the requirements of this contract, and shall promptly reject all work and material not conforming to the requirements of this contract. The Contractor, at the expense of the Commission, shall promptly correct workmanship which does not comply with the requirements of this contract by making the same comply therewith and shall promptly replace any material or equipment which does not conform to such requirements. The Contractor, at the expense of the Commission, shall promptly take all action necessary for the collection or enforcement of any claim it or the Commission may have against any subcontractor or material man for defective workmanship or equipment furnished by the Contractor,

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or if required by the Commission will assign such claim to the Commission and authorize the Commission to bring an action thereon at its own expense and in its own name or that of the Contractor.

(f) All inspection and tests by the Commission shall be performed in such manner as not to unnecessarily delay the work.

ARTICLE 13.

(a) Title to all Vessels and to all materials, equipment, supplies and all other property assembled at the site of the Facilities or elsewhere for the purpose of being used for the construction of the Vessels as well as title to any material, machinery, or equipment ordered for use in connection with the performance of work under this contract to the extent the Commission or the Contractor makes payment therefor, even though delivery thereof has not been made, shall vest in the Commission. These provisions as to title shall not operate to relieve the Contractor of any of its obligations under this contract.

(b) When any payment is to be made hereunder, the Commission, as a condition precedent to making such payment, may, in its descretion, require that affidavits satisfactory to it be furnished by the Contractor showing what, if any, liens or rights in rem of any kind against the Vessels or the materials or equipment on hand for use in the construction thereof have been or can be acquired for or on account of any work done, or any materials or equipment already incorporated as a part of the Vessels, or on hand for that purpose; but it is hereby further stipulated, covenanted and agreed by the Contractor, for itself and on its own account and for and

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on account of all persons, firms, associations, or corporations furnishing labor or material for the Vessels, and this contract is upon the express condition, that no liens or rights in rem of any kind shall lie or attach upon or against the Vessels, or materials or equipment therefor, or any part thereof, or of either, for or on account of any work done upon or about such Vessels, or of any materials or equipment furnished therefor or in connection therewith, or for or on account of any other cause or thing, or of any claims or demands of any kind, except the claims of the Commission: Provided, however, that in case by reason of the laws of any State, the Contractor shall be unable to comply with such express condition, the Commission may waive such condition or take such other action as it may deem proper under the circumstances.

ARTICLE 14.

(a) No patented or patent-pending article or device which involves the payment of any license fee or royalty in addition to the purchase price of such article shall be purchased or supplied by the Contractor in connection with the work under this contract without the prior approval of the Commission.

(b) The Commission will pay directly all royalties, license fees or engineering fees for the introduction, construction, use or operation in any of the Vessels of all patented features, devices, apparatus, machinery or equipment which may be furnished by the Commission under the provisions of Article 4 hereof. The Contractor shall pay all other royalties, license fees, or engineering fees for the introduction or use of patented features in the Vessels whether in connection with the method of their

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design, materials, or their construction or their use and operation, and for the introduction and use of all devices, apparatus, methods and processes employed in connection with the equipment and fitting of each Vessel, if such fees are not paid by the Commission, but any payment so made by the Contractor shall be reimbursed to the Contractor by the Commission.

ARTICLE 15.

Each Vessel shall be built under survey of the American Bureau of Shipping and the Contractor shall allow duly authorized representatives of said Bureau access to the Facilities and to the work of subcontractors and to the Vessels at any and all proper times during the performance of this contract. The Commission will pay all fees charged by said Bureau.

ARTICLE 16.

In the performance of the work covered by this contract the Contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quanti-

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ties and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3, of the Act of Congress approved March 3, 1933 (41 U. S. C. 10).

ARTICLE 17.

Wherever practicable, the Contractor shall obtain from responsible firms or individuals competent to furnish the materials or equipment, or to undertake the work involved or any part thereof, competitive bids for all materials, equipment, or services required, and shall award orders therefor to the lowest satisfactory bidders; provided that as a condition precedent to the award of any order hereunder it shall obtain the approval of the Commission or its duly authorized representative and upon the approval of the Commission or its duly authorized representative the Contractor may award orders upon the basis of market or negotiated prices. There shall be no mingling of purchases covering materials or services required under this contract and those required by the Contractor for other work. The Contractor shall not make any subcontract for part of the work to be performed hereunder or place any order for materials or services calling for a payment without the prior approval of the Commission, but the Commission may prescribe conditions and limitations subject to which orders may be placed without prior approval. The Contractor may purchase any services or materials required for its performance of this contract from any company or companies associated with or affiliated with the Contractor, it being understood that the Contractor shall be entitled to pay to such companies and they shall be entitled to receive reasonable market prices

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for all services and materials so furnished by them, respectively, to the Contractor with the prior approval of the Commission.

ARTICLE 18.

(a) As a condition to the employment by the Contractor of any person to perform any of the work contemplated by this contract and who will be paid from any funds made available under this contract, the Contractor shall, if the Commission so directs, require such person to execute and to file an affidavit in such form as to satisfy the requirements of said Public No. 5 (77th Congress), but the execution and filing of such affidavit shall be without prejudice to the right of the Commission to require such further evidence in the premises as it may deem desirable.

(b) The Commission may require the removal or discharge of any person employed in or about the Facilities if it is determined that the employment of such person is detrimental to the performance of the work under this contract.

ARTICLE 19.

(a) The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

(b) The Contractor will report monthly, and will cause all subcontractors to report in like manner, within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, the man-hours worked, and the total expenditures for materials. He shall furnish to the Department of Labor the names and addresses of

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all subcontractors on the work at the earliest date practicable: Provided, however, that the requirements of this paragraph shall be applicable only for work at the site of the construction project.

(c) The Contractor will comply with the provisions of this paragraph which are substantially the regulations promulgated pursuant to the provisions of Public Act No. 324, 73rd Congress, approved June 13, 1934, (48 Stat. 948) by the Secretary of the Treasury and the Secretary of the Interior:

(i) Said Act reads as follows:

“To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

“Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secre-

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tary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

(ii) Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans, or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....)
) SS:
 County of.....)

I,(name of party signing affidavit).....(title), do hereby certify that I am (the Employee of)..... (name of Contractor or subcontractor) who supervised the payment of the employees of said Contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of.....(project), for the weekly pay roll period from the.....day of, 19....., to the..... day of, 19.....; that no rebates or deductions from any wages due any such person as set

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out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above-named project.

.....

Sworn to before me this.....day of....., 19.....

(iii) Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered within 7 days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal Agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such 7-day period to the Federal agency having control of the project.

(iv) At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by sub-paragraph (iii) hereof a

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statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by subparagraph (ii) hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

(d) This contract is subject to the provisions of the Act of June 25, 1936 (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

ARTICLE 20.

Until otherwise provided by law, provisions of law prohibiting more than 8 hours of labor in any one day of persons engaged upon work covered by this contract shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.), be suspended. The provisions of said Act approved October 10, 1940 are applicable to this contract.

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ARTICLE 21.

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Commission the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts of sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

ARTICLE 22.

The Contractor covenants that it will have and maintain at all times, sufficient working funds for the carrying out of its obligations hereunder, and will make prompt payment for all labor, materials, services, and other charges which are to be paid under this contract, provided that the Contractor will not be in default under this contract for failure to make such payments if such failure is due to the fact that the Commission has not paid any properly executed voucher payable under the terms of this contract within 10 days of its delivery to the Commission at Washington, D. C. Prior to the making of any payment by the Commission to the Contractor hereunder by way of reimbursement or otherwise the Contractor shall furnish to the Commission adequate evidence that the Contractor has commitments, satisfactory to the Commission, of cash loans available to it throughout the period of the Contractor's performance in a total amount of not

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less than \$1,600,000, of which total not less than \$800,000 shall be non-interest bearing funds supplied by stockholders of the Contractor in such form as to be fully subordinated to all obligations of the Contractor under the provisions of this contract or share capital, fully paid in cash.

ARTICLE 23.

The following shall constitute events of default under this contract :

(a) Failure of the Contractor in any respect to use due diligence in proceeding with the performance of the work required under this contract, or failure to perform any of the covenants on its part to be performed hereunder, provided that the Commission in either instance shall give notice to the Contractor as to such failure and Contractor shall not within thirty days after being so notified cure such failure.

(b) The filing by the Contractor of a petition in bankruptcy or for reorganization under the Bankruptcy Act or the entry of an order upon petition against the Contractor adjudicating the Contractor a bankrupt, or the appointment of a receiver or receivers of the Contractor or any property belonging to the Contractor necessary for the performance of its obligations under this agreement.

ARTICLE 24.

(a) Upon the occurrence of any of the events of default set forth in Article 23 hereof the Commission may terminate this contract and enter upon the site of the Facilities referred to in the Facilities Contract and take possession thereof as well as of any Vessels either com-

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pleted or uncompleted and any machinery, materials, fittings, equipment and supplies theretofore or thereafter delivered at the site of the Facilities to be incorporated in the construction or the equipment of the Vessels, or to be used in connection therewith, together with all plans, specifications, calculations and other records required for the construction or equipment of the Vessels. The termination of this contract, pursuant to the provisions of this Article, shall terminate the Facilities Contract in accordance with the terms of Article 23 thereof, and in such event the rights and obligations of the parties under the Facilities Contract shall be those stipulated in said Article 23 in case of the occurrence of an event of default thereunder. Subsequent to termination under this Article the Contractor shall not have any right to use or occupy the premises on which the Facilities or any part thereof shall have been erected or constructed. In the event that such premises or any part thereof have been leased by the Contractor from third parties, the Contractor shall promptly execute an assignment of the lease or leases to said premises, which assignment shall be satisfactory in form and substance to the Commission. In the event that said premises or any part thereof are owned by the Contractor, but leased to the Commission, any permit, permission or license theretofore granted by the Commission to the Contractor to use said premises during the term of such lease shall automatically terminate upon termination of this Contract hereunder pursuant, and the Commission shall have the right to use and occupy the premises as lessee of the Contractor under the terms of any lease which it may have with the Contractor.

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(b) As soon as is practicable after termination of this contract pursuant to the provisions of this Article the Commission will make an audit of the Contractor's accounts and pay to him an amount equal to all costs not theretofore paid by the Commission to which the Contractor may then be entitled under the provisions of Article 7 hereof. After the effective date of termination the Contractor shall receive no further payments on account of the fee provided for in Article 8 hereof and all rights of the Contractor to receive any such payments shall cease and determine except that the Contractor shall be entitled to such payments on account of its fee as shall have accrued by reason of launchings or deliveries of Vessels launched or delivered prior to such effective date of termination.

(c) The Commission may waive the right to terminate the contract and take possession upon default, or may exercise such right and subsequently permit the Contractor to resume the performance of this contract without prejudice to the Commission's right to take such possession at a later time for the same or any subsequent default.

ARTICLE 25.

The Commission may at any time prior to the completion of the work to be performed cancel this contract upon written notice to the Contractor. Upon the effective date of such cancellation the Contractor shall stop all work hereunder except as otherwise directed by the Commission. In the event of cancellation under this Article, the Contractor shall be paid all costs reimbursable under Article 7 hereof which have been incurred prior to the effective

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date of cancellation or which are incurred by him in the performance of work directed to be done by the Commission in completing partially completed vessels or which he may be required to pay or be liable for the payment of by reason of such cancellation. In the event of cancellation pursuant to this Article 25 the Commission shall pay to the Contractor as compensation for its work and services under this contract the following fees:

- (i) With respect to each Vessel completed and delivered hereunder up to and including 12 Vessels, the sum of \$140,000 per Vessel, less any payments which have been made on account of Contractor's fee respecting any such Vessel.
- (ii) With respect to each of the balance of the Vessels completed and delivered hereunder the sum of \$110,000 per Vessel, less any payments which have been made on account of Contractor's fee respecting any such Vessel.
- (iii) With respect to each Vessel partially completed on which work has been stopped under this Article, a fee equal to the percentage of work completed on such Vessel multiplied by \$140,000, in case less than 13 Vessels have been completed and delivered, or by \$110,000 if more than 12 Vessels have been completed and delivered. In determining such percentage of completion due account shall be taken of materials on hand whether partially worked or not, and allowance shall be made for items furnished by the Commission and delivered to the Contractor.

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The provisions of this Article in respect to the fee payable on cancellation shall not apply to any renewal or extensions of this Contract, such fee to be determined by negotiation in the event of any such renewal or extension.

ARTICLE 26.

In the event that during the course of the work hereunder the Facilities shall be destroyed or so damaged as to prevent work on the Vessels for an estimated period of 90 days or more, the Commission may elect to terminate this contract or have the Contractor reconstruct or repair the Facilities.

If the Commission shall elect to have the Facilities reconstructed or repaired by the Contractor the Contractor shall be paid the cost of the reconstruction or repair work. If the Commission shall elect to terminate the contract the payments to be made to the Contractor shall be determined in accordance with the provisions of Article 25 hereof.

ARTICLE 27.

No member of or delegate to Congress, nor Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909 (35 Stats. 1109). No member of or delegate to Congress, nor Resident Commissioner, shall be employed by the Contractor either with or without compensation as an attorney, agent, officer, or director. (Sec. 805 (e), Merchant Marine Act, 1936.)

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ARTICLE 28.

The Contractor may, in its discretion, and shall, if and as required by the Commission, secure fidelity and other similar bonds, workmen's compensation, public liability, and automobile liability insurance and such other insurance as may be required by the laws of the state in which the Facilities are located. The Contractor may also obtain other insurance against liabilities of the Contractor to any third person for any cause whatsoever except liabilities adequately covered by insurance provided by the Commission for benefit of itself and the Contractor. The Contractor shall also secure such other insurance as the Commission may direct or approve.

The Contractor shall have no duty to insure against risk of loss of or damage to any property of the Commission including, without limitation, the Facilities and Vessels or any part thereof unless the Commission shall, in writing, direct the Contractor to insure such property, and then only to the extent and in the manner directed. The Commission hereby releases the Contractor from any liability on account of loss of or damage to any property of the Commission not covered by insurance.

All insurance required pursuant to instruction of the Commission shall at all times be maintained with companies, underwriters, or underwriting funds, in amounts and under forms of policies, satisfactory to the Commission.

The Contractor shall not be deemed to have warranted the validity or coverage of any such insurance. In the event that any of the insurance required by the Commission hereunder by reason of any act, omission, or neg-

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ligence of the Contractor shall not be kept in full force and effect, the Contractor shall pay to the Commission all losses and indemnify the Commission against all claims and demands which would otherwise have been covered by such insurance.

ARTICLE 29.

In the event of any dispute or difference of opinion between the parties hereto as to any matter or thing arising out of or relating to this contract, or any provision hereof, which cannot be settled between the parties themselves (except disputes as to the occurrence of an event of default under Article 23 hereof which disputes shall not be the subject of arbitration) they shall submit the matter in dispute to arbitration by three disinterested arbitrators, each of the parties hereto to choose one arbitrator and the two so chosen to choose the third arbitrator. The party desiring such arbitration shall give to the other party written notice of its desire, specifying the question or questions to be arbitrated and naming the arbitrator chosen by it.

Within a reasonable time thereafter, not exceeding twenty (20) calendar days, the other party shall give in like manner like written notice specifying any additional questions to be arbitrated and naming the arbitrator chosen by it.

If a party hereto shall fail to appoint an arbitrator within twenty (20) calendar days after the other party

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shall have so given such written notice of its desire to arbitrate, the party having appointed the arbitrator may thereupon request the American Arbitration Association to appoint the arbitrator for the party in default and such Association shall thereupon appoint such arbitrator. The two arbitrators thus chosen shall then select the third. In the event that the two arbitrators chosen by or for the parties hereto fail, within ten (10) calendar days, to select the third arbitrator, the third arbitrator, upon written request of either party hereto, shall be appointed by the American Arbitration Association. Should said American Arbitration Association cease to exist or fail or refuse for a period of twenty (20) days to appoint an arbitrator after having been requested to do so by either party hereto, in the manner herein provided, then such party may request any judge of any United States Circuit Court of Appeals to appoint such arbitrator, which judge shall thereupon be fully authorized to make such appointment. The decision of any two of the three arbitrators thus chosen when reduced to writing and signed by them shall be final, conclusive and binding upon both parties hereto.

The arbitrators so appointed shall determine which party shall assume the expenses of such arbitration or the proportion of such expenses which each party shall bear; and the arbitration expenses so allocated shall be paid direct by the party or parties by which the same are directed to be paid.

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In Witness Whereof, the parties hereto have executed five original counterparts of this agreement as of the day and year first above written with the intent that each of them shall have full force and effect independently of the others; but full performance of one shall be deemed full performance of all.

UNITED STATES MARITIME COMMISSION

(Seal)

By: E. S. LAND

Chairman

Attest:

W. C. PEET, JR.

Secretary

CALIFORNIA SHIPBUILDING CORPORATION

(Seal)

By: JOSEPH HAAG, JR.

Vice President

Attest:

CHAS. F. STRENZ

Assistant Secretary

Approved as to Form:

WADE H. SKINNER

Assistant General Counsel

U. S. Maritime Commission

WSB

J. E. Schmeltzer

R. E. Anderson

(Plaintiff's Exhibit No. 1)

June 30, 1942

California Shipbuilding Corporation
P. O. Box 966
Wilmington, California

Subject: Change of contract number from
MCc-ESP-10 to MCc-7785

Gentlemen:

The Commission has determined to defray the cost of construction of the 31 vessels (Contractor's Hulls Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 13, 17, 18, 19, 20, 21, 22, 23, 27, 31, 32, 33, 34, 35, 36, 37, 41, 45, 46, 47, 48 & 49 and Commission's Hulls No. 64 to 94, inclusive) covered by your contract with the Commission, dated March 14, 1941, as amended (No. MCc-ESP-10), from funds made available under the provisions of Public Law No. 247 instead of Public Law No. 5, as indicated in said contract.

You are requested, in submitting future vouchers for payment under said contract, or whenever necessary to make reference to the contract number of said contract, to use the contract number "MCc-7785" instead of "MCc-ESP-10." The contract number of said contract is hereby changed from "MCc-ESP-10" to "MCc-7785."

A copy of this communication should be attached to Counterparts II and IV of the executed contract which were forwarded to you for your files. Mimeographed copies of this communication will be furnished to you at a later date to be attached to your conformed copies of said contract.

Very truly yours,

(Sgd.) E. S. LAND

E. S. Land

Chairman

(Plaintiff's Exhibit No. 1)

Addendum No. 1

Contract MCc-ESP-10

This Agreement, made and entered into as of the 19th day of March, 1941, between the United States Maritime Commission (herein called the "Commission") and California Shipbuilding Corporation, a corporation organized and existing under the laws of the State of Delaware (herein called the "Contractor"),

Whereas:

1. Under date of March 14, 1941, the Commission and the Contractor entered into a contract (herein called the "Ship Construction Contract") for the construction of certain vessels therein described; and

2. The Commission will enter into a contract with Gibbs & Cox, Inc., naval architects, providing, among other things, for the performance of certain engineering work and the preparation of specifications and requisitions and the purchase of material, machinery and equipment for the vessels to be constructed under the Ship Construction Contract, which services shall include the preparation of See Bee tracings of working plans and bills of material referred to in paragraph (c) of Article 12 of the Ship Construction Contract.

Now, Therefore, the parties hereto agree to amend Article 12 of the Ship Construction Contract so as to add thereto a paragraph lettered (g), which paragraph shall read as follows:

"(g) The Contractor may employ the architect referred to in paragraph (c) hereof in connection with the construction of the Vessels to perform ser-

(Plaintiff's Exhibit No. 1)

vices in addition to those referred to in said paragraph (c), and the Commission, if it authorizes or approves such employment of the architect, shall pay to said architect all the cost of such additional services as provided in the contract between the Commission and said architect."

In Witness Whereof the parties hereto have executed this agreement as of the day and year first above written.

UNITED STATES MARITIME COMMISSION

(Seal)

By: E. S. LAND

Chairman

Attest:

W. C. PEET, JR.

Secretary

CALIFORNIA SHIPBUILDING CORPORATION

(Seal)

By: JOSEPH HAAG, JR.

Vice President

Attest:

CHAS. F. STRENZ

Assistant Secretary

Approved as to Form:

WADE H. SKINNER

Assistant General Counsel

U. S. Maritime Commission

WSB

Case No. 4256 WM Civ. Pacific Electric vs. U. S. Pltf. Exhibit 1. Date 10/30/46. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[Endorsed]: Filed Jan. 23, 1948. Edmund L. Smith,
Clerk. [23]

[Endorsed]: No. 11843. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Pacific Electric Railway Company, a corporation, Appellee. Pacific Electric Railway Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed January 28, 1948.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. C. C. A. 11843

UNITED STATES OF AMERICA,
Appellant and Cross-Appellee,

v.

PACIFIC ELECTRIC RAILWAY COMPANY, a cor-
poration,

Appellee and Cross-Appellant.

STATEMENT OF POINTS ON WHICH THE
UNITED STATES INTENDS TO RELY AS
APPELLANT

Rule 75(d)

The points on which the United States intends to rely
as appellant are as follows:

1. The District Court erred in holding that the ship-
ments covered by Government Bills of Lading Nos. MC-
88579, MC-28270, and MC-34759 were not the property
of the United States at the time of shipment.

2. The District Court erred in holding that plaintiff is
entitled to full commercial rates on the shipments covered
by said Government Bills of Lading.

3. The District Court erred in not holding that the
shipments covered by said Government Bills of Lading at
all times while undergoing transportation thereunder were

“Property of the United States” according to the meaning of that phrase, Section 321(a) of the Transportation Act of September 18th, 1940, and in not holding that the shipments were therefore entitled to move at land-grant freight rates.

4. The District Court erred in awarding judgment for plaintiff.

Respectfully submitted,

H. G. MORISON

Acting Asst. Attorney General

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

ARLINE MARTIN

Assistant U. S. Attorneys

By Arline Martin

Attorneys for Appellant and Cross-Appellee

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 5, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STATEMENT OF POINTS ON WHICH PACIFIC
ELECTRIC RAILWAY COMPANY INTENDS
TO RELY AS APPELLANT

The appellant, Pacific Electric Railway Company, a corporation, hereby states that in its appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled proceeding, intends to rely on the following points.

1. The District Court erred in not awarding plaintiff judgment in the sum of \$8,943.82, instead of judgment in the sum of \$1,143.66, as awarded.

2. The District Court erred in determining that the shipment involved were "military or naval property moving for military or naval and not for civil use" within the meaning of Section 321(a) of the Transportation Act of 1940.

3. The District Court erred in not allowing plaintiff full commercial rates on all shipments involved in the action.

Dated this 7th day of February, 1948.

Respectfully submitted,

FRANK KARR

C. W. CORNELL

E. D. YEOMANS

By E. D. Yeomans

Attorneys for Appellant, Pacific Electric Railway
Company

[Endorsed]: Filed Feb. 9, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION DESIGNATING PORTIONS OF
THE RECORD TO BE PRINTED UNDER
RULE 19

It Is Hereby Stipulated and Agreed, by and between the parties in the above entitled action, by and through their respective counsel, that the portions of the record to be printed shall consist of the entire certified type-written transcript of record, as furnished by the clerk of the District Court, including all exhibits.

Dated: February 10, 1948.

Respectfully submitted,

H. G. MORISON

Acting Asst. Attorney General

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

ARLINE MARTIN

Assistant U. S. Attorneys

By Arline Martin

Attorneys for Appellant and Cross-Appellee

FRANK KARR

C. W. CORNELL

E. D. YEOMANS

By E. D. Yeomans

Attorneys for Appellee and Cross-Appellant

[Endorsed]: Filed Feb. 11, 1948. Paul P. O'Brien,
Clerk